(19)

No. 92-1988-CFX
Status: GRANTED

Title: Ticor Title Insurance Company, et al., Petitioners
v.
Walter Thomas Brown and Jeffrey L. Dziewit

Docketed:
June 15, 1993

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Klein,Joel I., Taranto,Richard G.

Counsel for respondent: North,Gerald D. W., Hartunian,Aram A., Goldstein,Robert P., Reed,Kelly

NOTE: 061693 ck rec'd

Entry	Date	Note	Proceedings and Orders
1	Jun 15 1993	G	Petition for writ of certiorari filed.
3	Jul 19 1993		Brief of respondents Walter Brown, et al. in opposition filed.
4	Jul 21 1993		DISTRIBUTED. September 27, 1993
5	Jul 29 1993	X	Reply brief of petitioners filed.
6	Oct 4 1993		Petition GRANTED. limited to Question 1 presented by the petition. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 16, 1993. The brief of respondents is to be filed with the Clerk and served upon opposing counsl on or before 3 p.m., Tuesday, December 14, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m.,Wednesday,January 5, 1994. Rule 29 does not apply. **********
7	Oct 14 1993	D	Motion of respondents to defer briefing and oral argument filed.
8	Oct 22 1993		Opposition of petitioners Ticor Title Insurance Co., et al. to motion of respondents to defer briefing and filed.
9	Oct 28 1993		Reply brief of respondents in support of the motion to defer briefing and argument filed.
10	Nov 1 1993		Motion of respondents to defer briefing and oral argument DENIED.
15	Nov 15 1993		Brief amicus curiae of Lawyers' Committee for Civil Rights Under law filed.
11	Nov 16 1993		Joint appendix filed.
12	Nov 16 1993		Brief of petitioners Ticor Title Insurance Company, et al. filed.
13	Nov 16 1993		Brief amici curiae of American Insurance Association, et al. filed.
14	Nov 16 1993		Brief amicus curiae of National Football League filed.
17	Dec 13 1993		Brief of respondents Walter Brown, et al. filed.
18	Dec 13 1993		Brief amicus curiae of Trial lawyers for Public Justice filed.
16	Dec 14 1993		Brief amici curiae of James Menendez, et al. filed.
19	Dec 14 1993		Brief amicus curiae of Owens-Illinois filed.
20	Dec 14 1993		Brief amicus curiae of Public Citizen filed.
21	Dec 14 1993		Brief amicus curiae of Association of Trial Lawyers of

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No. 92-1988-CFX

Entry	Date	Note	Proceedings and Orders
			America filed.
22	Dec 16 1993	G	Motion of Leslie O'Neal, et al. for leave to file a brief as amici curiae filed.
24	Dec 27 1993	D	Motion of Leslie O'Neal, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
23	Dec 29 1993		SET FOR ARGUMENT TUESDAY, MARCH 1, 1994.(1ST CASE).
25	Jan 4 1994		Reply brief of petitioner filed.
28	Jan 7 1994		CIRCULATED.
26	Jan 10 1994		Motion of Leslie O'Neal, et al. for leave to file a brief as amici curiae GRANTED.
27	Jan 10 1994		Motion of Leslie O'Neal, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
29	Jan 27 1994		Record filed.
		*	Partial proceedings United States Court of Appeals for the Ninth Circuit.
30	Feb 1 1994		Record filed.
		*	Original proceedings United States District Court for the District of Arizona. (Box)
31	Mar 1 1994		ARGUED.
32	Mar 25 1994		Letter from counsel for the respondents including the Ninth Circuit opinion of March 3, 1994, received and distributed.

No. 92-1988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

Supreme Court, U.S.
FILED
JUN 15 1993
OFFICE OF THE CLERK

TICOR TITLE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

WALTER THOMAS BROWN and JEFFREY L. DZIEWIT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court may refuse to enforce a prior federal class action judgment, properly certified under Rule 23, on grounds that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf.

2. Whether, for purposes of applying the antitrust state action doctrine, a State's clearly articulated and affirmatively expressed policy must not only permit private conduct but also displace all possibility of economic competition.

3. Whether a federal court in a proceeding under the federal antitrust laws may apply collateral estoppel to findings made in an administrative proceeding by the Federal Trade Commission, despite the statutory prohibition of 15 U.S.C. § 16(a).

4. Whether the applicability of the filed tariff doctrine depends upon the legality of the conduct in issue or the meaningfulness of the regulation.

PARTIES IN THIS PROCEEDING

The respondents in this proceeding are the individuals named as plaintiffs and representatives of the purported class in the complaint filed in this case, and were appellants in the Court of Appeals: Walter Thomas Brown and Jeffrey L. Dziewit.

Pursuant to Rule 29.1, this petition is filed by the six title insurance companies who were named as defendants in the complaint in this case, and who were appellees in the Court of Appeals: Ticor Title Insurance Company, Chicago Title Insurance Company, Security Union Title Insurance Company (formerly known as SAFECO Title Insurance Company), First American Title Insurance Company, Lawyers Title Insurance Corporation, and Stewart Title Guaranty Company. Each of the petitioners is a corporation.

Petitioners *Ticor Title Insurance Company, Chicago Title Insurance Company and Security Union Title Insurance Company* are, directly or indirectly, wholly-owned subsidiaries of Chicago Title and Trust Company, which is a wholly-owned subsidiary of Alleghany Corporation, a publicly-owned corporation. No non-wholly-owned subsidiary of these petitioners has publicly traded common stock.

Petitioner *Lawyers Title Insurance Corporation* is a wholly-owned subsidiary of Lawyers Title Corporation, a publicly-owned corporation. No non-wholly-owned subsidiary of Lawyers Title Insurance Corporation has publicly traded common stock.

Petitioner *First American Title Insurance Company* is a wholly-owned subsidiary of First American Financial Corporation.

Petitioner *Stewart Title Guaranty Company* is a wholly-owned subsidiary of Stewart Information Services Corporation. Non-wholly-owned subsidiaries of Stewart Title Guaranty Company are listed in the Appendix hereto.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. ——

TICOR TITLE INSURANCE COMPANY, *et al.*
Petitioners,

v.

WALTER THOMAS BROWN and JEFFREY L. DZIEWIT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *Brown v. Ticor Title Ins. Co.*, No. 91-15474, entered December 28, 1992. Petitioners seek review of the Court of Appeals' adoption and application of a new rule of due process as grounds for refusing to honor a prior federal class action judgment barring the claims asserted in this case. Petitioners also request that this Court correct other errors in the decision of the Court of Appeals.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 982 F.2d 386, and is reprinted in the Appendix at 1a. The unreported decision below of the United States District

Court for the District of Arizona, filed March 5, 1991, is reprinted in the Appendix at 17a.

The decisions approving and affirming the prior class action judgment are: *In re Real Estate Title and Settlement Services Antitrust Litigation*, 1986-1 Trade Cas. (CCH) ¶ 67,149 (E.D. Pa. 1986) (reproduced in the Appendix at 31a), *affirmed without opinion*, 815 F.2d 695 (3d Cir. 1987) (App. 78a), *cert. denied*, 485 U.S. 909 (1988) (App. 79a).

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1992. App. 2a. A timely petition for rehearing was denied on March 17, 1993. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE

The decision of the Court of Appeals refusing to honor the prior class action judgment was based on the due process clause of the Fifth Amendment to the United States Constitution, which states: "No person shall be . . . deprived of life, liberty or property, without due process of law."

The certification and settlement of the prior class action was carried out pursuant to Rule 23 of the Federal Rules of Civil Procedure, which is reproduced in the Appendix at 80a.

STATEMENT OF THE CASE

This petition seeks review of the Court of Appeals' ruling refusing on due process grounds to grant *res judicata* effect to a previously entered class action judgment.

The Prior Judgment. In June 1986 the federal district court in Philadelphia entered its final judgment in the consolidated multidistrict antitrust litigation known as *In re Real Estate Title and Settlement Services Antitrust*

Litigation, MDL No. 633. The judgment settled a series of class action lawsuits against six title insurance companies, the present petitioners, which had sought injunctive relief and damages under the federal antitrust laws by reason of an alleged conspiracy to fix the price of title search and examination and settlement services, carried out through the insurers' participation in state-licensed title insurance rating bureaus in thirteen states. In a lengthy opinion accompanying the final judgment order (App. 31a-77a), the MDL 633 district court described the history of the case, the procedures used in connection with its preliminary approval and hearing on the settlement, the basis for its decision to certify a settlement class, and the grounds for its final approval of the settlement.

Under the terms of the settlement the members of the MDL 633 plaintiff class, who were estimated to number more than 3.4 million (App. 43a), received a package of benefits from the defendant title insurers. In exchange, the class members released their federal and state law claims arising from any allegations that the defendants agreed or conspired to fix the price of title insurance, including title search and examination and/or settlement services. The benefits provided to the class included enhanced title insurance coverage for class members who were current policyholders, reduced rates on newly issued policies for class members who were not current policyholders, and undertakings by the defendants not to engage in the challenged conduct for a specified period. App. 64a-71a. Notice of the proposed settlement was published on two occasions in each of thirty-six newspapers in the thirteen affected states, with aggregate circulation of more than 6 1/4 million. App. 41a n.4. Inquiries and comments were made by hundreds of class members, and the district court conducted a public hearing prior to its final approval. App. 42a-43a.

The district court held that the class could be properly certified under Rule 23(b)(1) and (b)(2), which do not

require an opportunity for class members to opt out of the action. It found that there was "a serious risk that courts in separate actions could impose inconsistent obligations on the defendants" in fashioning injunctive relief with respect to the defendants' rating bureau activities, thus satisfying the requirements of Rule 23(b)(1)(A). App. 48a. It also found that the plaintiffs' challenge was to "activities [by the defendants] which are generally applicable to the proposed class" and for which injunctive relief was appropriate "for the class as a whole," thus satisfying the requirements of Rule 23(b)(2). App. 49a.

The district court declined to order opt-out procedures, holding that the due process rights of class members were "adequately protected by the Rule 23 requirements that the class be adequately represented by the representative plaintiffs and by qualified counsel, that the class receive some adequate form of notice of the proposed settlement and that the court approve the settlement only if it is fair, adequate and reasonable." App. 51a. Ordering opt-out procedures in the case, in the district court's view, would "go against the strong public policy in favor of settlement of class actions," because it would make settlement unlikely and remove any realistic chance for relief for the class members. App. 51a-52a.

An objecting class member appealed the MDL 633 final judgment. The appellant principally asserted that because the settlement resolved monetary damage claims of class members, due process required that opt-out procedures be given, citing this Court's decision in *Phillips Petroleum Co. v. Shutts ("Shutts")*, 472 U.S. 797 (1985).[1] Despite these arguments the Third Circuit affirmed without opin-

[1] Relying on *Shutts*, the dissident class member (the State of Arizona) argued in its appeal in the Third Circuit that "due process requires that absent class members have the right to opt out of a class action settlement that seeks to foreclose their claims for damages." Appellant's Opening Brief at 13, *In re Real Estate Title and Settlement Services Antitrust Litigation* (3d Cir., No. 86-1450, filed Sept. 23, 1986).

ion the final judgment entered by the district court. 815 F.2d 695 (3rd Cir. 1987) (App. 78a). The appellant petitioned for a writ of certiorari to review the affirmance by the Third Circuit, again arguing that opt-out procedures were constitutionally required under *Shutts*.[2] The certiorari petition was denied. *Arizona v. Chicago Title Insurance Co.*, 485 U.S. 909 (1988) (App. 79a).

In the seven years since the MDL 633 final judgment was entered, the defendant title insurers (the present petitioners) have carried out the final judgment according to its terms, providing the specified benefits for the members of the MDL 633 class.

The Proceedings Below. The present case is one of three that have been filed as collateral attacks on the MDL 633 judgment.[3] The complaint was filed in April

[2] The dissenting class member sought review in this Court of the Third Circuit's affirmance by arguing that "*Shutts* clearly holds that if a class action seeks to bind class members concerning their individual claims for damages, due process requires that the class members be provided with an opportunity to opt out. . . . the Third Circuit ignored the *Shutts* holding and refused to permit opt outs in a case in which due process required opt outs." Petition for Writ of Certiorari, *Arizona v. Chicago Title Ins. Co.* (U.S., No. 86-1963, filed June 1987).

[3] At the same time that it was actively pursuing its appeals from the MDL 633 judgment, the State of Arizona filed a state court suit on behalf of Arizona purchasers of title insurance, asserting state antitrust claims against the same defendants arising from the same conduct at issue in MDL 633. The title insurers sought in the MDL 633 court to enjoin the prosecution of this state court suit on *res judicata* grounds, but the Third Circuit held that the res judicata effect of the MDL 633 judgment should be raised as a defense in state court. *In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir.), *cert. denied* 493 U.S. 821 (1989). The title insurers later sought and obtained dismissal of the state case on *res judicata* and substantive state law grounds; the state court dismissal was affirmed on appeal

1990 in the federal district court in Phoenix, seeking injunctive relief and damages from the same six title insurers who were the defendants in MDL 633. The claims were brought by two individual purchasers from the states of Arizona and Wisconsin (two of the thirteen states at issue in MDL 633) on behalf of an alleged class of purchasers from those states, and asserted that the defendants had conspired to fix the prices for title search and examination services in violation of the federal antitrust laws.

The defendants moved for summary judgment dismissing the plaintiffs' claims as barred under *res judicata* by the MDL 633 final judgment, and the district court granted summary judgment on this ground. App. 28a. The district court noted that the identity of parties and claims required for application of *res judicata* was present. The defendants were the same as in MDL 633, the named plaintiffs were members of the MDL 633 plaintiff class, and the claims asserted were within the scope of the MDL 633 final judgment. App. 26a. The district court rejected the plaintiffs' asserted grounds for refusing to honor the prior judgment: It held that the MDL 633 class members from Arizona and Wisconsin had not been

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on substantive grounds without reaching the *res judicata* issue. *Tucson Unified School Dist. v. Chicago Title Ins. Co.*, 167 Ariz. 114, 804 P.2d 843 (Ariz. App. 1991).

A second state court suit filed in Wisconsin, asserting state antitrust claims on behalf of Wisconsin title insurance purchasers against the MDL 633 defendants and other title insurers, was dismissed in the trial court on *res judicata* and substantive grounds. *Prentice v. Title Ins. Co. of Minnesota*, No. 89-CV-012004 (Circuit Ct., Milwaukee Cty.). The Wisconsin Supreme Court has recently affirmed the trial court's dismissal on substantive grounds without reaching the *res judicata* issue. *Prentice v. Title Ins. Co. of Minnesota*, Nos. 91-0402, 91-1580 (S.Ct. Wisc., Slip Op. filed June 9, 1993).

In both the Arizona and Wisconsin state court cases, the trial courts dismissed the claims on *res judicata* grounds despite arguments that opt-out procedures were constitutionally required in MDL 633 under *Shutts*.

inadequately represented in connection with the settlement (App. 20a-25a); and it found that there had been no failure of due process by reason of the refusal of the MDL 633 court to provide opt-out procedures for class members (App. 26a-28a). As to the latter argument by the plaintiffs, which was based on this Court's *Shutts* decision, the district court held that the MDL 633 judgment was distinguishable from *Shutts* because of the equitable character of the relief afforded by the settlement, and found that the procedures used by the MDL 633 court were sufficient to satisfy due process. App. 27a-28a.

The district court did not address the alternative ground upon which the defendants sought judgment dismissing the plaintiffs' damage claims: that under the filed tariff doctrine,[4] even if an antitrust violation could be proven and injunctive relief obtained, no damages could be recovered by the plaintiffs for having been charged the rates which were "lawful rates" under the states' systems of insurance rate regulation. The district court did address the state action doctrine as a defense to the plaintiffs' claims, even though neither plaintiffs nor defendants had sought judgment on that ground or briefed the issue. App. 28a-30a. The district court stated that even if *res judicata* were not applicable, the plaintiffs' claims would be barred by the state action doctrine, which holds that private conduct undertaken pursuant to state policy and supervision is not subject to federal antitrust liability. *Id.*

On appeal, the Ninth Circuit Court of Appeals, like the district court, noted the identity of parties and claims between the present case and MDL 633, and held that *res judicata* would bar the plaintiffs' claims unless the plaintiffs could demonstrate inadequate representation or a denial of due process. App. 8a. The Court of Appeals

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[4] See *Keogh v. Chicago and N.W. Ry. Co. ("Keogh")*, 260 U.S. 156 (1922); *Square D Co. v. Niagara Frontier Tariff Bureau ("Square D")*, 476 U.S. 409 (1986).

concluded like the district court that the class had been adequately represented in MDL 633. App. 8a-11a.

The Court of Appeals, however, accepted the plaintiffs' argument that the absence of opt-out procedures in MDL 633 was a denial of due process. Its reasoning was based on its characterization of MDL 633 as a "hybrid suit that involved the foreclosure of substantial damage claims," App. 12a, and on its view that opt-out procedures were required in such suits as a matter of law:

> According to *Shutts*, minimal due process requires that "an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court," if monetary claims are involved. 472 U.S. at 812. Because [the present plaintiffs] had no opportunity to opt out of the MDL 633 litigation, we hold there would be a violation of minimal due process if [their] damage claims were held barred by *res judicata*.

App. 12a. The Court of Appeals held that the present plaintiffs were bound by the injunctive relief provided by the MDL 633 settlement and could not seek further injunctive relief in the present suit, but held that their claims for monetary damages were not barred by *res judicata* and could be pursued. *Id.*

The Court of Appeals also addressed the applicability of the state action doctrine and filed tariff doctrine as defenses to the plaintiffs' claims. It held that the state action doctrine did not protect the title insurers' conduct in Arizona because the state title insurance statute there, even though it specifically permitted the title insurers' joint rate filing activity, did not "displace competition with regulation" and therefore did not satisfy the state policy element of the state action test. App. 13a. In Wisconsin, the Court of Appeals held the state action doctrine did not apply because this Court, in its decision last term in a related proceeding against the title insurers by the

Federal Trade Commission,[5] "definitively held" that the active supervision element of the doctrine was not satisfied. App. 14a. The Court of Appeals held that the filed tariff doctrine did not apply to bar the plaintiffs' damage claims because the Arizona and Wisconsin statutes under which the rates were filed and charged did not provide for affirmative governmental approval of the rates in question. App. 14a-16a.

The title insurers' petition for rehearing was denied on March 17, 1993. They now seek review in this Court of the Court of Appeals' ruling reversing the grant of summary judgment in their favor in the district court below.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECISION ARTICULATES A NEW CONSTITUTIONAL RULE WITH FUNDAMENTAL IMPLICATIONS FOR THE ADMINISTRATION OF FEDERAL CLASS ACTIONS.

The Ninth Circuit held that the final judgment in MDL 633 could not constitutionally bind respondents (and the classes they represent) with respect to their monetary claims, because the federal court entering the class action judgment in MDL 633 did not afford them the right to opt out of the earlier case. The Ninth Circuit found that the respondents' due process rights were violated, even though the MDL 633 class was properly certified under Rule 23(b)(1) and (b)(2), was adequately represented, and received adequate notice. This holding establishes a novel, far-reaching, and incorrect constitutional rule.

The Ninth Circuit's opinion leaves unclear which of two different due process guarantees it meant to establish, or rely on, in its decision. One reading of the opinion would entitle *all* persons with monetary claims to opt out of a class action because of a fairness-based right to control the litigation of one's own monetary claims. *Cf., e.g.,*

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[5] *FTC v. Ticor Title Ins. Co.*, 112 S.Ct. 2169, 2179 (1992).

Martin v. Wilks, 490 U.S. 755 (1989) (discussing right of individual control). A second possible reading focuses on the due process limits on jurisdiction. *Cf., e.g., Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945). Under this more limited reading, the Ninth Circuit's decision holds that a federal district court's power is restricted to those persons who have minimum contacts with the State (or district) in which the district court sits *or* who consent to jurisdiction by foregoing the opportunity to opt out. Such a reading presumes that respondents and the classes they represent from Arizona and Wisconsin have no minimum contacts with Pennsylvania, or with the Eastern District of Pennsylvania where the MDL 633 court sat. The Ninth Circuit's opinion does not say which of these due process concepts it meant to invoke.

Under either reading, however, review is warranted. The decision would absolutely bar all mandatory federal class actions involving damages, at least in any such case involving class members who reside outside the State or district in which the federal class action court is located. This would result in the elimination of a well-established mechanism for the fair and efficient disposition of class-wide claims. For that reason, the decision conflicts with Rule 23 and precedent in other Circuits. It also rests entirely on a misapplication of language in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), thereby suggesting a need for further clarification by this Court.

Finally, the Ninth Circuit's ruling is wrong. In fact, mandatory multi-state federal court class actions certified under Rule 23(b)(1) and (b)(2) that include damage claims satisfy due process concerns. They provide "fair" process to absent class members because they require procedural protections, particularly adequate representation by the representative plaintiffs. Moreover, they can bind class plaintiffs nationwide because the existence of constitutionally sufficient minimum contacts for federal court jurisdictional purposes is determined by reference to the

United States as a whole rather than any particular State or district.

1. a. The Ninth Circuit's decision creates substantial adverse effects for the application of Rule 23 of the Federal Rules of Civil Procedure, the Multidistrict Litigation Statute, 28 U.S.C. § 1407, and for the fair and efficient adjudication of complex federal court litigation. The decision invalidates the well-established practice of using compulsory class actions to resolve monetary claims in circumstances that satisfy the requirements of Rule 23(b)(1) or (b)(2). As a result, class actions raising essentially identical and interrelated claims will be more difficult to resolve and multiple litigation will increase.

The decision renders Rules 23(b)(1) and (b)(2) unconstitutional in a large class of cases—class actions, or at least multi-state class actions, which include any kind of monetary claim. Rules 23(b)(1) and (b)(2), in pointed contrast to Rule 23(b)(3), do not provide for any right to opt out. Yet the essential function of certifying a class action under those provisions is to give the resulting judgment binding effect on all class members under normal principles of *res judicata*. *See* Rule 23(c)(3) and Advisory Committee's Note to Rule 23, 39 F.R.D. 98, 105 (1966); *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984); 7B CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE & PROCEDURE § 1789 (1986); 3B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.60 at 439-440 (2d ed. 1993). To deny *res judicata* effect to class actions under Rule 23(b)(1) and (b)(2) is thus to invalidate those provisions of the Rule. Such invalidation of a federal Rule is by itself reason enough for this Court's review.

The practical effect of the Ninth Circuit's ruling is to harm both the judicial system and litigants by crippling Rule 23(b)(1) and (b)(2) as tools for the fair and effi-

cient handling of class actions. The drafters of Rule 23 wrote (b)(1) and (b)(2) to provide for mandatory class actions (*i.e.*, without a right to opt out) precisely because the situations they cover are those in which the interests of all class members are intertwined. In such cases, class treatment is based on practical equitable considerations, such as the risk of inconsistent and incompatible relief if multiple injunctive cases were pursued, or the risk that piecemeal assertion of damage claims by multiple plaintiffs may exhaust a limited pool of funds from which the damages could be satisfied.[6]

Cases certified under Rule 23(b)(1) or (b)(2) frequently involve monetary claims as well as claims for injunctive relief, as when back pay is part of an employment discrimination case brought under (b)(2) or, as here, when an antitrust suit challenges both past and future market-wide practices and settles for both prospective and retrospective relief (under (b)(1)(A) and (b)(2)). Mandatory class certification under these provisions has repeatedly been used in multi-state class cases in other circuits where the appropriate equitable circumstances were present, notwithstanding the inclusion of monetary claims. *See, e.g., King v. South Central Bell Tel. & Tel. Co.*, 790 F.2d 524 (6th Cir. 1986) (employment discrimination); *Van Gemert v. Boeing Co.*, 590 F.2d 433 (2d Cir. 1978), *aff'd*, 444 U.S. 472 (1980) (securities case); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977) (antitrust); *Linquist v. Bowen*, 813 F.2d 884 (8th Cir. 1987) (government benefits unlawfully

[6] Rule 23(b)(1) provides for class certification when separate adjudications would risk inconsistent standards for the defendant (subsection (A)) or would unfairly favor certain plaintiffs over other, similarly situated plaintiffs by, for example, allowing early plaintiffs to deplete a common fund (subsection (B)). Rule 23(b)(2) provides for class certification when the case presents an equitable challenge to the defendant's unitary conduct toward the class as a whole.

withheld); *Wetzel v. Liberty Mutuai Ins. Co.*, 508 F.2d 239, 249, 253 (3d Cir. 1975) (employment discrimination), *cert. denied*, 421 U.S. 1011 (1975). Indeed, this Court has upheld a nationwide (b)(2) class action involving monetary claims for payment of government benefits unlawfully withheld. *Califano v. Yamasaki*, 442 U.S. 682, 701-03 (1979).

The Ninth Circuit's blanket requirement of opt-out rights in any case involving monetary claims would upset this accepted practice and produce the very harm to fair and efficient adjudication that (b)(1) and (b)(2) are designed to address. By allowing class members to opt out, the ruling permits a proliferation of lawsuits on the same issues—exactly what occurred here. Such duplicative litigation burdens both the courts and the litigants and discourages settlement. It also promotes the risk of inequities of different outcomes for plaintiffs and defendants that are inevitable in cases where certification under (b)(1) or (b)(2) is warranted. In short, the Ninth Circuit ruling defeats all of the policies—judicial efficiency, finality, fairness, consistency—long embodied in Rule 23(b)(1) and (b)(2).[7]

The Ninth Circuit's ruling undermines not only Rule 23(b)(1) and (2) but also the multidistrict litigation system established by Congress in 28 U.S.C. § 1407. That

[7] In view of these policies, other circuits and the leading commentators have expressed a *preference* for certifying class actions under (b)(1) or (b)(2) where their standards are met—even if (b)(3), with its opt-out rights, could also be used—explaining that it is a virtue, not a vice, that class members can be bound without any right to opt out. *See, e.g., Kyriazi v. Western Elec. Co.*, 647 F.2d 388, 393 (3d Cir. 1981); *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 249, 253 (3d Cir. 1975), *cert. denied*, 421 U.S. 1011 (1975); *In re A.H. Robins Co.*, 880 F.2d 709, 728 (4th Cir. 1989), *cert. denied*, 493 U.S. 959 (1989); 3B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.31[3] at 236 (2d ed. 1993); 7A CHARLES A. WRIGHT, ARTHUR R. MILLER, & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 1772, at 424-26 (1986).

statute embodies a specific determination by Congress that federal suits presenting common questions should be consolidated in a single federal court, for pretrial purposes, rather than left to proceed in multiple federal courts at the option of the plaintiffs; and the statute has often been used to consolidate class actions initially filed in several districts. *See* HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 9.13 *et seq.* (3d ed. 1992). The multidistrict system expressly contemplates, moreover, that the court in which the cases are consolidated (the transferee court) may enter final judgment upon settlement, dismissal, summary judgment, or other pre-trial disposition. *See* Rule 14, Rules of Procedure of the Judicial Panel on Multidistrict Litigation; 28 U.S.C. § 1407(f).

The Ninth Circuit's opt-out requirement overrides this congressional policy of compulsory consolidation by permitting out-of-state class members with monetary claims to bring separate, multiple suits. The ruling thus makes unconstitutional what Congress has authorized to occur under 28 U.S.C. § 1407, and what did occur in this case—entry of a final judgment in the transferee court (here, the Eastern District of Pennsylvania) with binding effect on all the parties, including all members of the plaintiff class. The Ninth Circuit's decision, by mandating state-by-state federal class actions, subverts application of the multi-district litigation statute where it is needed most.

b. The Ninth Circuit's decision conflicts with a long line of circuit court decisions specifically rejecting due process challenges to mandatory class actions—multi-state and single state—involving monetary claims certified under Rule 23(b)(1) and (b)(2). *See, e.g., Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 506 (5th Cir. 1981) (argument "that the settlement agreement violated [class members'] right to due process because it did not provide them a means of opting out . . . is without merit"); *Kyriazi v. Western Electric Co.*, 647 F.2d 388, 393 (3d Cir. 1981) (due process [does] not require receipt of a pre-judgment opportunity to opt out"); *Robertson v. National Basketball Ass'n*, 556 F.2d 682, 686 (2d Cir. 1977) ("preclusion of the opt-out right in (b)(1) settlement does not violate due process").[8] Although these opinions, like the Ninth Circuit here, did not specifically distinguish between a "minimum contacts" due process challenge and a more general "fairness" due process challenge, the Second Circuit has specifically rejected a minimum contacts challenge in a multi-district federal class action case, concluding that "Congress may, consistent with the due process clause, enact legislation authorizing the federal courts to exercise nationwide federal jurisdiction" and that Congress had done so under the multidistrict litigation statute, 28 U.S.C. § 1407. *In re Agent Orange Prod. Liability Litigation*, 818 F.2d 145, 163 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988) (Rule 23(b)(3) class).[9]

The Ninth Circuit ignored settled class-action practices and precedents in reliance on a single line from this

[8] In a pre-*Shutts* decision the Ninth Circuit itself reached a similar result. *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981) (due process does not "require the unnamed plaintiffs be given a chance to opt out of Rule 23(b)(2) class actions").

[9] *But cf. In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d at 766-69 & n.6 (3d Cir.). In the latter decision, the Third Circuit applied reasoning based on *Shutts* to hold that an Arizona state suit collaterally attacking the MDL 633 judgment could not be enjoined by the MDL 633 court in the absence of minimum contacts or a grant of opt-out rights. The Third Circuit expressly limited its decision to the question of whether the state suit could be enjoined, and distinguished the issue of whether the state court plaintiffs were bound by the class action settlement; it noted that the burden of litigating in a distant forum discussed in *Shutts* did not apply to an absent class plaintiff so long as the plaintiff was free to "challenge the adequacy of representation in the forum of its choice." *Id.* at 769.

Court's decision in *Shutts*: "we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." 472 U.S. at 812 (quoted in part at App. 12a). This Court should clarify the confusion created by this seemingly categorical language in *Shutts*;[10] there is no justification for perpetuating such uncertainty with respect to an issue of such obvious practical importance.[11]

c. This case amply demonstrates that, unless the due process rules are clearly established, complex class action

[10] The Ninth Circuit's decision applies this language from *Shutts* categorically to any case involving monetary claims, regardless of the relation of those claims to the case as a whole. However, the *Shutts* decision explicitly qualified the quoted language by noting: "Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims *wholly or predominately* [sic] *for money judgments.*" 472 U.S. at 811 n.3 (emphasis added). This qualification echoes precisely the traditional Rule 23 distinctions. *See* Advisory Committee's Note to Rule 23, 39 F.R.D. 98, 102 (1966) (Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominately [sic] to money damages"). In certifying the MDL 633 class judgment under (b)(1)(A) and (b)(2), the district court specifically found that the case did not come within that description because in addition to damage claims, it involved substantial injunctive claims and relief—requiring defendants to refrain from certain activities and also affirmatively to provide additional insurance to class-members. *MDL 633*, App. 49a-50a, 56a. The Ninth Circuit did not purport to quarrel with this view, and in fact relied on the characterization of the case as a "hybrid suit" for both injunctive relief and damages. App. 12a.

[11] The Ninth Circuit is not alone in its apparent confusion over the meaning of this language. *See In re A.H. Robins Co.*, 880 F.2d 709, 744-45 (4th Cir. 1989), discussing, *e.g.*, Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions after Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1 (1986); Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 UNIV. OF MICH. J. L. REF. 347 (1988).

litigation can be unravelled many years after completion, thereby unfairly undoing a settlement or judgment that has already been satisfied in good faith by the defendant. In the present case the Ninth Circuit ruling destroys the bargained-for exchange under which a unified resolution of interrelated injunctive and damage claims was achieved seven years ago in the MDL 633 litigation. The question of whether due process permitted the MDL 633 case to be certified without an opt out procedure was directly addressed and resolved by the MDL 633 district court consistent with prevailing law (*MDL 633*, App. 50a-52a), and the class action judgment was affirmed and certiorari was denied despite the assertion by Arizona class members of precisely the same legal argument that was later adopted by the Ninth Circuit in the present case. App. 78a, 79a. In reliance on the finality of the judgment, the defendant title insurers implemented the provisions of the class settlement providing enhanced title insurance coverage and other benefits to a class estimated to number 3.4 million people in thirteen states. See *MDL 633*, App. 38a n.4, 64a-71a.

Apparently, in the Ninth Circuit's view, the MDL 633 class members are permitted to retain and enforce all of the benefits they have received from the class settlement, while each remains free to seek new and potentially duplicative relief. App. 12a (plaintiff is "bound by the injunctive relief provided by the settlement in MDL 633" but may pursue "claims for monetary damages"). The unfairness of that result is patent: petitioners would not have agreed to binding affirmative injunctive relief in the MDL 633 judgment in return for nothing. The Ninth Circuit's decision upsets the settled expectations upon which tangible benefits have been provided to millions of people.[12]

[12] The importance of finality of judgments has led this Court in the criminal procedure area to hold that new constitutional rules that are a "clear break" from the past may not be applied on col-

2. The Ninth Circuit's decision is wrong in respect to both its broader and narrower readings. As to the broader reading, this Court has recently reaffirmed that the normal right of individuals to their own day in court on their own claims does not apply in a properly certified class action under the Federal Rules. *See Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989). It is well-established that the constitutional conditions for a judgment in a class action to bind class members subject to its jurisdiction are adequate notice and adequate class representation—neither one of which was at issue here, because notice was not challenged, and the Ninth Circuit expressly found that the MDL 633 class was adequately represented. App. 8a-12a. *See Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) ("under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on members in any subsequent litigation"); *Hansberry v. Lee*, 311 U.S. 32 (1940); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); Restatement (Second) of Judgments §§ 1, 17, 19, 41(1)(e) (1982). Moreover, even the application of general due process principles, *see, e.g.*,

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lateral attack to invalidate previously entered final judgments, which are to be judged for constitutional sufficiency under the rule in effect at the time the judgment was rendered. *Wright v. West*, 112 S.Ct. 2482 (1992); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Teague v. Lane*, 489 U.S. 288 (1989); *Griffith v. Kentucky*, 479 U.S. 314 (1987). The Court's decisions in civil cases have not focused on this issue specifically, though the development of the principle in criminal cases has drawn on civil case precedent. *E.g., Teague v. Lane*, 109 S.Ct. at 1074, *citing Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940). Justice Souter recently noted the principle that new constitutional rules may not be applied in collateral challenges to final judgments in criminal cases, but remarked that "[n]o such difficulty exists in the civil arena, in which there is little opportunity for collateral attack of final judgments." *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439, 2446 (1991) (Souter, J.). This is precisely what occurred in the present case, however.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976), plainly supports the validity of the long-established and duly promulgated Rule 23(b)(1) and (b)(2): the fairness, consistency, and efficiency interests served by those provisions amply justify the absence of any opt-out right, given that adequate notice and representation ensure a proper hearing for all arguments and interests.

In fact, the Ninth Circuit opinion rests on a misreading of the Court's statement in *Shutts* which it wrenched out of context. *Shutts* presented no question about any general fairness right of class members with monetary claims to opt out of a class action in order to control litigation of their claims. The issue in that case was one of personal jurisdiction—whether a state court could constitutionally acquire jurisdiction over, and therefore bind, out-of-state class plaintiffs who lack any "minimum contacts" with the State, if class members are afforded an opportunity to opt out of the action. *See Shutts*, 472 U.S. at 806-15. The Court held that affording a right to opt out is constitutionally sufficient because class members who choose not to opt out have adequately consented to the state court's jurisdiction, and consent is an independent basis for personal jurisdiction.[13] The quoted statement relied on by the Ninth Circuit simply explains what is needed to establish consent to jurisdiction—namely, an opportunity not to consent. The statement therefore has nothing to do with, and cannot support, any unqualified due process right of class members to control the litigation of their monetary claims.

Shutts likewise does not support a narrower reading of the Ninth Circuit decision—a holding that, for reasons of

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[13] *See Shutts*, 472 U.S. at 812 ("Any plaintiff may consent to jurisdiction. The essential question, then, is how stringent the requirement for a showing of consent will be. We think that . . . the right to "opt out," [along with adequate notice,] satisfies due process."); *id.* at 814 ("We conclude that the Kansas court properly asserted personal jurisdiction over the absent plaintiffs and their claims against [the defendant].").

territorial power, out-of-State class members with monetary claims have a right to opt out, even in a *federal* court class action like the present case. *Shutts* involved the jurisdiction of a *state* court, so that due process required either minimum contacts with the State or consent to the court's jurisdiction in order for the court to bind a party to its judgment. Taking that bedrock requirement of "contacts or consent" as a given, the Court was concerned only with plaintiff class members "who have no minimum contacts with the forum State" (*Shutts*, 472 U.S. at 811) and who therefore had to give consent (by declining to exercise an opt-out right) in order to be subject to the state court's jurisdiction. That holding has no application in a class action like the present one, brought in *federal* court, because personal jurisdiction does not depend on consent. Here, jurisdiction in the Eastern District of Pennsylvania for all class members was based on the requisite contacts.

Simply put: where the members of the plaintiff class all have "minimum contacts" with the *United States*, that is enough to establish the federal court's personal jurisdiction over the class. The territorial jurisdiction of a court of the United States is no more limited by state boundaries than is the territorial jurisdiction of a state court constitutionally limited by the boundaries of cities, counties, or other subdivisions within a State. Otherwise, the Constitution would prohibit federal courts with multistate jurisdiction, such as the Claims Court, this Court (with its original and appellate jurisdiction), and the circuit courts (which occasionally have exclusive nationwide jurisdiction, *e.g.*, 42 U.S.C. § 7607(b)(1)). That result is not only absurd but contrary to long-established precedent and practice. *See generally* 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1067.1 (1987); *United States v. Union Pacific Railroad Co.*, 603-04 (1878).[14]

[14] The Second Circuit has specifically rejected a minimum contacts claim in a multidistrict case, concluding that "Congress may,

The critical distinction between federal and state courts is easy to overlook because of the independent requirement of proper service of process on defendants under Rule 4, Fed. R. Civ. P., which is usually permitted only within the limits set by the state in which the federal court sits. *See* Rule 4(e); *Omni Capital Int'l v. Rudolf Wolff & Co. ("Omni")*, 484 U.S. 97 (1987). Under that Rule, unless a defendant is properly served, jurisdiction that the court could exercise does not attach, and a defendant is generally free to sit back and ignore the proceeding. But Rule 4's service-of-process limits are not relevant here for two reasons. First, they are not a constitutional matter and therefore cannot support a due process limit on the power of the district court for the Eastern District of Pennsylvania authorized under the mutlidistrict litigation statute. *See In re Agent Orange Prod. Liability Litigation*, 818 F.2d at 163. Second, the Rule 4 requirement of service of process has no application to a *plaintiff* class. It is Rule 23 that sets the requirements for notice to members of such a class and the conditions under which the jurisdiction of the court will attach so as to bind class plaintiffs in the proceeding. *See Hansberry v. Lee*, 311 U.S. at 41 (class actions do *not* come within the usual service-of-process rules). The limits on service of process, in short, have no bearing on the constitutional reach of the federal courts' jurisdiction over absent plaintiffs.

The error of the Ninth Circuit's constitutional ruling is particularly clear in a case brought under one of the federal statutes, like the Clayton Act here, 15 U.S.C. § 22, that expressly authorize nationwide service of process. *E.g.*, 15 U.S.C. § 78aa (1934 Securities Exchange Act), 28 U.S.C. § 2361 (Foreign Sovereign Immunities

consistent with the due process clause, enact legislation authorizing the federal courts to exercise nationwide federal jurisdiction" and that Congress had done so under "the multidistrict litigation statute" (28 U.S.C. § 1407). *In re Agent Orange Prod. Liability Litigation*, 818 F.2d 145, 163 (2d Cir. 1987).

Act), 18 U.S.C. § 1965(b) (RICO). *See also* 4 WRIGHT & MILLER, *supra*, § 1067.1, at 311 n.23. In that circumstance, even Rule 4 allows nationwide service. Rule 4(e). In such cases, the courts of appeals have widely held that the constitutional due process requirement is satisfied by the presence of minimum contacts with the United States as a whole, not with any particular State. *See, e.g., Fitzsimmons v. Barton*, 589 F.2d 330 (7th Cir. 1979); *FTC v. Jim Walter Corp.*, 651 F.2d 251 (5th Cir. 1981); *Mariash v. Morrill*, 496 F.2d 1138 (2d Cir. 1974); *see also Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406 (9th Cir. 1989); *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309 (9th Cir. 1985).

What the Ninth Circuit's ruling in this case does is worse than to ignore that line of cases. Instead, it applies a *more* restrictive due process standard to plaintiff class members than would apply to defendants in the same case. That result turns the *Shutts* reasoning on its head, since *Shutts* held that, with respect to personal jurisdiction, absent class plaintiffs are entitled to *less* due process protection than defendants. *See Shutts*, 472 U.S. at 811 ("Because States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in non-class suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter.")[15] Far from being supported by *Shutts* the ruling below, even if read narrowly, is undermined by *Shutts*.

[15] This Court has long acknowledged congressional power to authorize nationwide service. See 4 WRIGHT & MILLER, *supra*, § 1067.1, at 328 n.74 (citing cases). More recently, however, the Court has expressly declined to address the constitutional issues raised by the theory that a federal court may exercise personal jurisdiction over a federal claim based on the defendant's contacts with the Nation as a whole. *Omni*, 484 U.S. at 102 n.5.

II. THE COURT OF APPEALS DECISION CONTAINS CERTAIN CLEAR ERRORS OF LAW.

In addition to its refusal to apply *res judicata* effect to the final judgment in MDL 633, the Court of Appeals made clear errors of law as to several substantive matters addressed in its decision below. These errors are clear enough to warrant summary reversal even if the petition is not granted as to the first question presented.

A. The Holding Below On The State Action Issue Is Contrary To Federal Statutory Law And Controlling Precedent Of This Court.

Even though no party moved for summary judgment on that basis, the Court of Appeals held that the state action doctrine[16] does not apply to the defendants' participation in state-licensed rating bureaus in Arizona and Wisconsin. App. 12a-14a.[17] The decision of the Court of Appeals on this issue is contrary to precedent of this Court and federal statutory law.

Arizona. The Court of Appeals' state action ruling as to Arizona is based on the first prong of the state action test: the requirement that the challenged conduct be undertaken pursuant to clearly articulated and affirmatively expressed state policy. The Court of Appeals held that

[16] The state action doctrine provides antitrust immunity for state-regulated conduct of private parties where (1) the private conduct is undertaken pursuant to "clearly articulated and affirmatively expressed" state policy, and (2) the private conduct is "actively supervised" by the state. *California Retail Liquor Dealers Ass'n v. Mideal Aluminum*, 445 U.S. 97, 105 (1980).

[17] The action of the Court of Appeals in addressing this issue was inappropriate to its role as a reviewing court. As noted above, the district court's *sua sponte* ruling on this ground was not prompted by the motion of any party, and was made without the development of any legal or factual record. The panel could properly have reversed the district court on this basis, but should not have precluded the parties from developing the record on this issue at the appropriate time.

for a state policy to satisfy the first prong of the state action test, the policy must both authorize the challenged actions and demonstrate an intent by the state legislature to "displace competition with regulation." App. 13a. The Court of Appeals held that the state policy requirement was not satisfied because Arizona did not displace competition with regulation, relying on language from the Arizona title insurance statutes (A.R.S. § 20-341) stating that the statutes were not "intended to prohibit or discourage reasonable competition." *Id.*

The Court of Appeals' ruling is contrary to precedent of this Court which holds that a state regulatory policy need not eliminate all possibility of competition in order to satisfy the state action doctrine. In *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 59-60 (1985), this Court held that a state policy that permitted but did not compel participation by regulated parties in rating bureaus satisfied the state policy prong of state action analysis. Such a regulatory approach, according to this Court, was a legitimate state policy which balanced "the efficiency of collective ratemaking and the competition fostered by individual [rate] submissions." *Id.* at 59. As this language makes clear, the presence of some elements of competition in the regulatory policy did not disqualify it under the state action doctrine.

The Arizona statutes specifically authorize collective ratemaking by title insurance rating bureaus as part of the state's "extensive" program of regulation over title insurance rates. *Tucson Unified School Dist. v. Chicago Title Ins. Co.*, 167 Ariz. 114, 115, 804 P.2d 843, 844 (App. 1991). The Court of Appeals' view that Arizona's state policy is nonetheless insufficient under the state action doctrine because it does not expressly discourage or prohibit competition under the regulatory structure clearly conflicts with this Court's holding in *Southern Motor Carriers.*

Wisconsin. The panel based its ruling on state action in Wisconsin solely on a *sua sponte* fact finding concern-

ing the second prong of the state action test: the requirement that the conduct in issue be actively supervised by the state. No factual record was made in the district court or presented to the Court of Appeals concerning this issue. The Court of Appeals nonetheless ruled that active supervision was lacking because a decision by this Court last term upheld a related Federal Trade Commission decision that "there was no active supervision in Wisconsin." App. 14a.[18]

The Court of Appeals' ruling on this issue violates federal statutory law. Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), explicitly directs that "in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall *not* be given to any finding made by the Federal Trade Commission" (emphasis added).[19] This Congressional directive is neither odd nor academic, but reflects a legislative determination that in a private antitrust suit defendants should not have liability imposed on them without the evidence first being tested through the discovery, evidentiary and trial procedures applicable in the federal courts. The Court of Appeals' ruling denies the defendants their statutory right to have the allegations against them determined on the basis of a fact record developed according to judicial procedures, rather than by applying collateral estoppel to findings from an FTC administrative proceeding.

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[18] *FTC v. Ticor Title Ins. Co.*, 112 S.Ct. 2169 (1992). That decision involved a review of an FTC decision against five of the six present petitioners. *In the Matter of Ticor Title Ins. Co., et al.*, Docket No. 9190 (FTC Final Order, Sept. 19, 1989). The case is now on remand in the Third Circuit to address further issues.

[19] On review of an FTC decision, of course, no independent fact findings are made by the reviewing courts, which merely assess whether there is any substantial evidence to support the agency's findings below. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 455 (1986).

B. The Holding Below On The Filed Tariff Doctrine Is Contrary To Controlling Precedent Of This Court.

The Court of Appeals rejected the application of the filed tariff doctrine of *Keogh v. Chicago and N.W. Railway Co. ("Keogh")*, 260 U.S. 156 (1922), as a bar to plaintiffs' damages claims, on grounds that defendants' rates "were the product of unlawful activity" and "were not subjected to meaningful review by the state." App. 15a-16a. This reasoning is contrary to precedent of this Court.[20]

The Court of Appeals' assertion that the *Keogh* doctrine does not apply to rates which were the product of "unlawful activity" fundamentally misapprehends the doctrine. As this Court made clear in *Keogh* itself, the filed tariff doctrine is not a doctrine of antitrust immunity; it presumes that the rates in question were the result of an antitrust violation and may be subject to governmental actions for either criminal or civil injunctive relief. 260 U.S. at 161-162. The doctrine nonetheless precludes antitrust plaintiffs from recovering damages for having been charged rates which were lawfully filed and effective under a statutory system of regulation. *Id.*[21]

The Court of Appeals' insistence on "meaningful review" is also erroneous. In *Square D Co. v. Niagara Frontier Tariff Bureau ("Square D")*, 476 U.S. 409

[20] The panel's reasoning is also incorrect insofar as it is based on factual conclusions concerning the lawfulness of the defendants' conduct and the extent of state review that have no basis in the record in the district court.

[21] The Ninth Circuit's ruling on this issue also conflicts, for example, with the decision of the Seventh Circuit in *Minsky v. Auto Driveaway Co.*, 1985-1 Trade Cas. (CCH) ¶ 66,477 (7th Cir.), *cert. denied*, 469 U.S. 1019 (1984), holding that the *Keogh* doctrine barred recovery of antitrust damages with respect to filed rates, even though the defendant carriers had been convicted of a criminal violation in the setting of the filed rates and the rates themselves had become effective "without any affirmative action on the part of the ICC." 1985-1 Trade Cas. at 65,405.

(1986), this Court held that the filed tariff doctrine is applicable even where the rates in question were filed with, but not investigated or approved by, the relevant regulatory authority. The appellate decision under review in that case noted that the defendants had engaged "in conduct that either was not or could not be approved" by the regulator, and they colluded in the "joint setting of rates and related policies," despite their failure to obtain authorization or approval to engage in joint rate-making. *Square D Co. v. Niagara Frontier Tariff Bureau*, 760 F.2d 1347, 1350 (2d Cir. 1985). The rates established in the filed tariffs had never been the subject of a prior regulatory approval process, but had been "allowed to go into effect" under the regulatory scheme without any prior hearing, challenge or regulatory action of any sort. *Square D*, 476 U.S. at 417. Despite this lack of prior regulatory action, this Court held that the defendants' rates "were, however, duly submitted, lawful rates . . . in the same sense that the rates filed in *Keogh* were lawful. Under the Court's holding in that case, it therefore follows that petitioners may not bring a treble-damages antitrust action." *Id.*

The reasoning by which the Court of Appeals rejected application of the *Keogh* doctrine is therefore contrary to precedent of this Court.[22]

[22] The Ninth Circuit's ruling also conflicts with the recent decision of the Wisconsin Supreme Court in another of the cases collaterally attacking the MDL 633 judgment. *Prentice v. Title Ins. Co. of Minnesota*, Nos. 91-0402, 91-1580 (S.Ct. Wisc., Slip Op. filed June 9, 1993). In that decision, the Wisconsin Supreme Court ruled that state law antitrust damage claims could not be pursued against the present petitioners and others on the basis of the conduct at issue in MDL 633 and the present case, because such claims "would undermine the [Wisconsin] regulatory scheme by allowing courts to award damages based on a rate which was never filed with the Insurance Commissioner" in violation of the *Keogh* doctrine. Slip Op. at 10. The State Supreme Court specifically rejected arguments that damage claims should be permitted because of the alleged illegality of the defendants' conduct and the

CONCLUSION

The Court should grant the writ of certiorari to review the refusal by the Court of Appeals to grant *res judicata* effect to the class action judgment in MDL 633. The Court should also correct the plain legal errors made by the Court of Appeals by summary reversal, even if review is not granted as to the first question.

Respectfully submitted,

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alleged lack of regulatory supervision by state officials. Slip Op. at 11, 12.

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-15474

D.C. No. CV-90-0577-PHX-SM

WALTER THOMAS BROWN, on behalf of themselves and all others similarly situated; JEFFREY L. DZIEWIT, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

TICOR TITLE INSURANCE COMPANY, a California corporation; CHICAGO TITLE INSURANCE COMPANY, a Missouri corporation; SECURITY UNION TITLE INSURANCE CO., as successor in interest to SAFECO Title Insurance Company, a California corporation; FIRST AMERICAN TITLE INSURANCE COMPANY, a corporation; LAWYERS TITLE INSURANCE CORPORATION, a Virginia corporation; STEWART TITLE GUARANTY COMPANY, a Texas corporation,
Defendants-Appellees.

[982 F.2d 386 (9th Cir. 1992)]

Appeal from the United States District Court
for the District of Arizona
Stephen M. McNamee, District Judge, Presiding

Argued and Submitted
April 16, 1992, San Francisco, California
Filed December 28, 1992

Before: Procter Hug, Jr., Thomas Tang, and Thomas G. Nelson, Circuit Judges

Opinion by Judge T.G. Nelson

COUNSEL

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Paul J. Laveroni, Cooley, Godward, Castro, Huddleston & Tatum, San Francisco, California; John C. Christie, Jr., Bell, Boyd & Lloyd, Washington, D.C. for the defendants-appellees.

OPINION

T.G. NELSON, Circuit Judge:

Appellants Brown and Dziewit (hereinafter "Brown") are representatives of the Arizona and Wisconsin classes of consumers of title insurance. After the approval of a settlement agreement in a class action in Pennsylvania involving the same parties, Brown filed the present action in the district court of Arizona alleging a conspiracy to fix price levels for title search and examination services. Brown sought relief from the district court in the form of (1) treble damages, (2) costs and attorney fees, and (3) judgment restraining and enjoining the appellees from engaging in unlawful conduct. The appellees, title insurance companies (hereinafter "Ticor"), filed a motion for summary judgment, based on *res judicata*, which the district court granted. We affirm the district court in part in

holding that *res judicata* bars injunctive relief, and reverse and remand on all other issues.

RELATED CASES

In 1985, following enforcement proceedings initiated by the Federal Trade Commission ("FTC"), twelve separate class action lawsuits were filed in five federal district courts in four states. The complaints alleged price fixing by various title insurance companies, encompassing the defendants in the present case, in thirteen affected states, including Arizona and Wisconsin. The class actions were consolidated as MDL 633 in the Eastern District of Pennsylvania by the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. § 1407. *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 1986-1 Trade Cas. (CCH) ¶ 67,149 (E.D. Pa. 1986), *aff'd without opinion*, 815 F.2d 695 (3d Cir. 1987), *cert. denied*, 485 U.S. 909 (1988). The complaints alleged that Ticor had violated the antitrust laws by participating in state-licensed rating bureaus which filed collective rates for real estate title search and examination services with state insurance regulatory bodies.

The district court in MDL 633 found that under *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), Ticor could establish at least the first part of the two-part test for a state action immunity defense. *See In re Real Estate*, 1986-1 Trade Cas. (CCH) ¶67,149, at 62,923.[1] Before the court could decide the second part of the test, however, the parties

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[1] The state action immunity doctrine protects private price-fixing if "the challenged restraint [is] one clearly articulated and affirmatively expressed as state policy [and] the policy [is] actively supervised by the State itself." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (quotations omitted) (hereafter, *"Midcal"*). The *Southern Motor Carriers* decision extended the state action immunity doctrine to situations where collective rate making was permitted but not compelled by state law. 471 U.S. at 61.

reached a settlement in which the monetary claims against Ticor were dropped. The settlement was accepted by the MDL 633 court in its written decision dated June 10, 1986. *Id.* at 62,937.

The Arizona attorney general then filed a new complaint in Arizona state court on behalf of state school districts seeking damages from the same defendants under state law. The MDL 633 court granted an injunction against the state court suit. The injunction was vacated by the Third Circuit, which held that the MDL 633 settlement could be collaterally attacked. *In re Real Estate and Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 769 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989). The court held that if a class member had "not been given the opportunity to opt out in a class action involving both important injunctive relief and damage claims," then the class member must have either "minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court that entertained the class action." *Id.* The court found that the class members in the MDL 633 case were not afforded the opportunity to opt out and did not have minimum contacts or consent to jurisdiction. The Arizona state court action was therefore allowed to proceed in part to decide if the plaintiffs were afforded due process in the MDL 633 action.

The Arizona state court dismissed the complaint. The Arizona Court of Appeals affirmed the dismissal, holding that Arizona's title insurance statutes authorized the "insurers to cooperate in rate-making in the issuance of title insurance policies," and therefore the activity was not within the purview of the Arizona antitrust laws. *Tucson Unified Sch. Dist. v. Chicago Title Ins. Co.*, 804 P.2d 843, 845 (Ariz. Ct. App. 1991).

In 1986, an Administrative Law Judge entered an initial decision in the FTC's enforcement action against various title insurance companies, including the defendants in this action, for price fixing in real estate title and search

services. *In re Ticor Title Ins. Co.*, Docket No. 9190, FTC Initial Decision of Administrative Law Judge (December 22, 1986). In its final order, the FTC found that the defendants' activities in Wisconsin and Arizona were not beyond the federal antitrust laws and that the state action immunity defense did not apply to defendants' activities in Wisconsin and Arizona because there was no active supervision by these states. *In re Ticor Title Ins. Co.*, Docket No. 9190, FTC Final Order (September 19, 1989).

The defendants petitioned the Third Circuit for review of the final order of the FTC in 1991. *Ticor Title Ins. Co. v. Federal Trade Comm'n*, 922 F.2d 1122 (3d Cir. 1991). The Third Circuit held that the defendants' "collective rate setting for title search and examination services in these six states [including Arizona and Wisconsin] [was] immune from federal antitrust liability under the state action doctrine," thereby rejecting the FTC's findings which rejected the state action immunity defense as to Arizona and Wisconsin. 922 F.2d at 1125-26. The court held that the state action immunity defense did not depend upon the quality of supervision, so long as "the state clearly articulates and actively supervises the [anticompetitive] policy." Id. at 1140. The Third Circuit therefore vacated the FTC's final order. Id. The FTC appealed the decision to the United States Supreme Court which reversed and remanded the Third Circuit's decision. *Federal Trade Comm'n v. Ticor Title Ins Co.*, 504 U.S. —, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992).

The Supreme Court held that the "mere potential for state supervision [was] not an adequate substitute for a decision by the State," and therefore concluded that the Wisconsin statute did not provide immunity from antitrust liability. *Id.* at —, 112 S. Ct. at 2179, 119 L. Ed. 2d at 425. The Supreme Court remanded the case for further proceedings as to the quality of state supervision under the regulatory scheme in Arizona.

FACTS AND PROCEDURAL HISTORY

In 1985, the MDL 633 class action claims were filed in Pennsylvania. In January, 1986, a settlement was reached and presented to the MDL 633 court. The settlement dropped the monetary claims against Ticor and provided for (1) an injunction against Ticor's participation in rating bureaus for a specified time period in five states, including Arizona and Wisconsin, (2) an increased dollar amount of each title insurance policy issued to class members in all thirteen states during the class period, (3) additional coverage for new title insurance policies purchased by class members, and (4) payment of the costs of lawsuit and attorneys' fees as approved by the MDL 633 court.

The MDL 633 court certified the class under Federal Rules of Civil Procedure 23(b)(1) and (b)(2)[2] and

[2] A class may be certified if it meets the requirements of Fed. R. Civ. P. 23(a):

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

The court found the necessary elements present.

Federal Rules of Civil Procedure 23 provides that a class action may be maintained if subdivision (a) is satisfied and, in addition, the prosecution of separate actions would create a risk of

> [23(b)(1)](A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or . . . [23(b)](2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . .

Fed. R. Civ. Proc. 23(b)(1)(A), (b)(2).

accepted the settlement. In doing so, the court considered and rejected objections to the settlement, including an attempt by the Arizona attorney general to opt out of the class. The court deemed these objections and requests to have been made on behalf of the states represented by the various attorneys general, and not on behalf of individual class members. *See In re Real Estate,* 1986-1 Trade Cas. (CCH) ¶ 67,149, at 62,926 n.5.

Brown filed the present action in the Arizona district court on behalf of Arizona and Wisconsin title insurance consumers alleging a combination and conspiracy by Ticor to fix, maintain and stabilize rates in Arizona and Wisconsin for title search and examination services in violation of the federal antitrust laws, codified at 15 U.S.C. § 1, *et seq.* (the Sherman Act). Ticor moved for summary judgment dismissing the action based on *res judicata,* claiming that Brown, as a party to the MDL 633 settlement, was bound by the settlement. Relying on *res judicata* as well as state action immunity, the district court granted Ticor's summary judgment motion. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1337, and we have jurisdiction of Brown's timely appeal pursuant to 28 U.S.C. § 1291.

STANDARD OF REVIEW

This court reviews a grant of summary judgment under a *de novo* standard. *In re Bullion Reserve of N. Am.,* 922 F.2d 544, 546 (9th Cir. 1991). If, viewing the record in the light most favorable to the nonmoving party, there are no genuine issues of fact and the moving party is entitled to judgment as a matter of law, the judgment will be affirmed. *Norfolk Energy, Inc. v. Hodel,* 898 F.2d 1435, 1439 (9th Cir. 1990).

I.

RES JUDICATA

Ticor contends that Brown was a member of the MDL 633 settlement class and was thus barred from relitigating the case in Arizona by *res judicata*. A lawsuit involving the same parties and based upon the same cause of action as asserted in a previous case is barred under the doctrine of *res judicata*. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.5 (1979). However, if the plaintiff was not adequately represented in the prior action or there was a denial of due process, then the prior decision has no preclusive effect. *Hansberry v. Lee*, 311 U.S. 32 (1940).

Admittedly, Brown was a member of the plaintiff class in the prior MDL 633 litigation and the same cause of action is involved. Thus, the issue is whether Brown falls within one of the two exceptions to the *res judicata* doctrine.

A. *INADEQUATE REPRESENTATION*

Brown contends that he was not adequately represented in the MDL 633 litigation, thereby rendering *res judicata* inapplicable to the present lawsuit, and that the district court therefore improperly granted Ticor's motion for summary judgment. To support his argument, Brown cites *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973). Brown contends that the Gonzales class representative was found to have inadequately represented all class members when the representative failed to take an appeal that "could not be characterized as patently meritless or frivolous." *Id.* at 76. The failure to prosecute an appeal deprived the class members, whose rights were not vindicated by the district court's decision, of full participation in the process. *Id.*

We hold that *Gonzales* is not applicable to the present situation. In *Gonzales*, the class members collaterally

attacked the settlement, demonstrating that the class representative secured a better monetary deal for himself than the rest of the class, and it was because of this that he failed to pursue an appeal on behalf of the class. *Id.* at 74-76. In the MDL 633 litigation, the settlement was similar for each class member.

Adequate representation as required by Federal Rules of Civil Procedure Rule 23(a)(4) "depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 855 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). On collateral attack of a judgment, however, we will not second-guess a prior decision that counsel adequately represented a class. Instead, to avoid the binding effect of a prior class action based on class counsel's error, a party must show not only that the prior representative " 'failed to prosecute or defend the action with due diligence and reasonable prudence,' " but also that " 'the opposing party was on notice of facts making that failure apparent.' " *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1278 (9th Cir.) (quoting *Restatement (Second) of Judgments* § 42 (1)(2) (1982)), *cert. denied*, 113 S. Ct. 408 (1992). Brown fails to present facts which indicate a lack of adequate representation.

1. *ARIZONA*

In arguing specifically for the Arizona class, Brown contends that counsel's failure to assert a 1981 Arizona case, *United States v. Title Ins. Rating Bureau, Inc.*, 517 F. Supp. 1053 (D. Ariz. 1981), *aff'd*, 700 F.2d 1247 (9th Cir. 1983), *cert. denied*, 467 U.S. 1240 (1984) ("*TIRBA*"), to the district court in the MDL 633 litigation established the inadequacy of representation of the Arizona class. The district court in *TIRBA* had held that the state action immunity defense was unavailable to

Ticor because the Arizona legislature intended to promote competition, not to replace competition with regulation.[8] *Id.* at 1059.

We hold that the failure of class counsel to specifically assert *TIRBA* was harmless error. The MDL 633 court referred to the case in its memorandum decision. *In re Real Estate,* 1986-1 Trade Cas. (CCH) ¶ 67,149, at 62,933. The case was known to the court, and the Arizona class was therefore not harmed by class counsel's failure to directly bring the case to the court's attention.

Brown also argues that, because MDL class counsel misinterpreted *Southern Motor Carriers* as providing Ticor with the first half of a state action immunity defense for activities in Arizona, the Arizona class should not be bound by the MDL 633 decision. We disagree. The import of *Southern Motor Carriers* was fully considered in the MDL 633 lawsuit. *See In re Real Estate,* 1986-1 Trade Cas. (CCH) ¶ 67,149, at 62,922-23. The Pennsylvania district court made clear its steadfast belief that Arizona and the other affected states permitted Ticor's allegedly anticompetitive activities. *Id.* at 62,923. The court therefore indicated that under *Southern Motor Carriers* Ticor could establish the first half of a state action defense. *See id.* at 62,922-23.

Even if class counsel might have challenged this ruling, it was an equally acceptable tactic to forego such a challenge and, instead, to attack the second half of Ticor's state action defense. This is especially true in view of the strength with which the MDL 633 court apparently held its view of *Southern Motor Carriers.* In pursuing this alternate course, class counsel undertook extensive discovery to determine whether Arizona and the other states actively supervised the alleged anticompetitive activity. *See id.* at 62,923. Under the circumstances, we conclude

[8] The state action immunity defense will be discussed more fully in Section II, *infra.*

that MDL 633 class counsel was not derelict in its duties owed to the class. Brown's argument here therefore fails to free the Arizona class from the binding effect of the MDL 633 judgment.

2. *WISCONSIN*

Brown asserts that the MDL 633 class counsel's failure to raise the "clear legislative intent of the Wisconsin statutory scheme" constituted inadequate representation of the Wisconsin class, and therefore *res judicata* should not preclude the lawsuit by the Wisconsin class. Brown contends that the Wisconsin statute "was clearly designed to promote competition," and this "design" should have been asserted by the MDL 633 class counsel. The failure to do so, according to Brown, amounted to inadequate representation of the Wisconsin class.

We hold there was no inadequate representation of the Wisconsin class. The Wisconsin statute stated that its purpose was to regulate the business of insurance in a manner that would preclude the application of federal antitrust laws. Wis. Stat. § 625.01(2)(f). This indicates an intent to replace competition with regulation and the failure to assert a legislative intent to the contrary was not inadequate representation.

B. *DUE PROCESS VIOLATION*

Brown also argues that minimal procedural due process must be provided in a class action lawsuit in order "to bind known plaintiffs concerning claims wholly or predominately" for monetary damages. *See Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811 n.3 (1985). Brown asserts that certifying the MDL 633 class pursuant to Federal Rules of Civil Procedure 23(b)(1) and (b)(2), which do not provide for the right to opt out, would be a violation of minimum due process if the class judgment precluded future recovery of damages, and therefore *res judicata* is not applicable to his case.

In order to bind an absent plaintiff concerning a claim for monetary damages, the court must provide minimal due process. *Id.* at 811-12. *Shutts* is limited to claims "wholly or predominately for money judgments." *Id.* at 811 n.3. The Third Circuit held that the MDL 633 litigation was a "hybrid suit that involved the *foreclosure of substantial damage claims.*" *In re Real Estate,* 869 F.2d at 768 (emphasis added). We follow the Third Circuit's holding.

According to *Shutts,* minimal due process requires that "an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court," if monetary claims are involved. 472 U.S. at 812. Because Brown had no opportunity to opt out of the MDL 633 litigation, we hold there would be a violation of minimal due process if Brown's damage claims were held barred by *res judicata.* Brown will be bound by the injunctive relief provided by the settlement in MDL 633, and foreclosed from seeking other or further injunctive relief in this case, but *res judicata* will not bar Brown's claims for monetary damages against Ticor.

II.

STATE ACTION IMMUNITY DEFENSE

The United States Supreme Court in *Midcal* established two requirements for antitrust immunity under *Parker v. Brown,* 317 U.S. 341 (1943): (1) the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy;" and (2) the policy must be "actively supervised" by the state. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum,* 445 U.S. 97, 105 (1980). *Southern Motor Carriers* extended the state action doctrine to situations where collective rate making conduct was permitted but not compelled by state law. *Southern Motor Carriers,* 471 U.S. at 61.

In *Traweek v. City and County of San Francisco,* 920 F.2d 589 (9th Cir. 1990), we stated a two part test to determine the existence of a "clearly articulated" state policy under the first prong of *Midcal.* The court must determine (1) whether the legislature authorized the challenged actions and, if so, (2) whether the legislature intended to displace competition with regulation. *Traweek,* 920 F.2d at 591-92. Although the Third Circuit has not addressed the issue of whether Wisconsin or Arizona passed the first prong of the Midcal test, see *Ticor,* 922 F.2d at 1135, we do so here because of the additional two part test set forth in *Traweek* which is required to satisfy the first prong of the *Midcal* test.

A. *ARIZONA*

In *Tucson,* the Arizona court found "rate-making by title insurance bureaus [was] specifically authorized by Arizona law," but made no determinations regarding the legislative intent to replace competition with regulation. 804 P.2d at 844.

Brown argues Arizona's legislative intent was to enhance competition, not replace it, thereby failing to meet the "clearly articulated" standard of *Midcal.* To meet the "clearly articulated" standard, Arizona must meet *Traweek*'s two part test. Arizona Revised Statute § 20-341 states that "nothing in this article is intended to prohibit or discourage reasonable competition." Based on this language and the lack of anything in the statute or legislative history to show a contrary intent, we hold the Arizona statute does not meet part two of the *Traweek* test which requires a showing of legislative intent to displace competition with regulation, and thus fails the first prong of the *Midcal* test. The state action immunity defense, therefore, will not protect Ticor from the lawsuit by the Arizona class.

B. *WISCONSIN*

Brown also contends that Wisconsin's statute does not show a clear legislative intent to replace competition with regulation, and therefore does not meet the *Traweek* test regarding "clear articulation."

Because the recent United States Supreme Court decision definitively held that there was no active supervision in Wisconsin, *Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. at —, 112 S. Ct. at 2179, 119 L. Ed. 2d at 425, we need not address Brown's argument concerning the first prong of the *Midcal* test. Wisconsin does not meet the second prong of *Midcal*, and thus the state action immunity defense will not protect Ticor from the lawsuit by the Wisconsin class.

III.

FILED TARIFF DOCTRINE

The Filed Tariff Doctrine, also known as the *Keogh* doctrine, emanates from *Keogh v. Chicago & N. W. Ry.*, 260 U.S. 156 (1922). In *Keogh*, a private shipper claimed that rates submitted to and approved by the Interstate Commerce Commission (ICC) under the Interstate Commerce Act (ICA) were the product of an antitrust violation. The Court found no violation where the rates were submitted to and approved by the ICC.

Brown contends that the present case involves state regulatory schemes which differ from the type of regulation in *Keogh*. The Arizona and Wisconsin statutes do not provide for affirmative governmental approval, as did the ICA. The *Keogh* doctrine therefore should not apply to the present case, according to Brown.

Ticor argues that the Arizona statutes regulate the title insurance business and that there are specific regulatory standards for title insurance rates established by Arizona law, and therefore those are legal rates under *Keogh*. In addition, according to Ticor, the Wisconsin law is clear that rates filed with the Commissioner of Insurance are legal rates under *Keogh*. Ticor contends the rates filed in Arizona and Wisconsin are legal rates and are thus protected from antitrust claims under *Keogh*.

In *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332 (9th Cir. 1990), nectarine and plum producers served either as members of administrative committees appointed by the federal Secretary of Agriculture or as employees of such committees which would issue and enforce standards for marketing nectarines and plums. The standards set forth by the committees allegedly favored the growers who were a part of the committees. The committee members promulgated the regulations themselves rather than making recommendations to the Secretary. *Id.* at 337. The defendants in *Wileman* contended that the Secretary "tacitly approved" the standards by failing to disapprove them as provided for in the regulations and that therefore *Keogh* should apply. *Id.* We held that:

> [G]overnmental approval [in *Keogh*] was required before there could be any effect from the collective activity and it was such approval that legitimized the allotments and the rates.
>
> . . . The *mere fact of failure to disapprove*, however, does *not legitimize otherwise anticompetitive conduct* . . . [Nondisapproval] does not guarantee any level of review whatsoever. . . . There is no affirmative process of non-disapproval which can be relied upon fairly to evaluate a committee's regulations. Second, non-disapproval is equally consistent with lack of knowledge or neglect as it is with assent.

Wileman, 909 F.2d at 337-38 (emphasis added).

In the present case, Ticor makes much of the fact that the filed rates are the only rates which it may legally charge in Arizona and Wisconsin. However, if those rates were the product of unlawful activity prior to their being

filed and were not subjected to meaningful review by the state, then the fact that they were filed does not render them immune from challenge. The absence of meaningful state review allows the insurers to file any rates they want. Therefore, the act of filing does not legitimize a rate arrived at by improper action.

The regulations of Arizona and Wisconsin require only "non-disapproval" of the rates and no not require compliance with strict guidelines such as those set forth under the ICC regulations. This case falls within the holding of *Wileman*, and we therefore hold the filed tariff doctrine is not applicable under either the Arizona or Wisconsin regulatory schemes.

IV.

CONCLUSION

The decision of the district court is hereby AFFIRMED IN PART in its holding that res judicata bars injunctive relief, and REVERSED IN PART and REMANDED for further proceedings on all other issues. Costs to Appellants.

[Stamped: Filed March 5, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV 90-0577-PHX-SMM

WALTER THOMAS BROWN, *et al.*,
Plaintiffs,

v.

TICOR TITLE INSURANCE CO., *et al.*,
Defendants.

MEMORANDUM AND ORDER

On September 14, 1990 Defendants filed a Motion for Summary Judgment, alleging that Plaintiffs' claims are barred under *res judicata* and the Filed-Tariff Doctrine. Plaintiffs timely responded and oral argument was heard on January 7, 1990.

I. BACKGROUND

Plaintiffs filed a class action complaint against Defendants for violation of the federal antitrust laws codified at 15 U.S.C. § 1 (the "Sherman Act"). Section one of the Sherman Act proscribes "any contract, combination or conspiracy" that unreasonably restrains the nation's domestic or foreign commerce. 15 U.S.C. § 1. Plaintiffs allege that Defendants "entered into a contract, combination or conspiracy" to fix price levels for title searches and examinations. (Complaint p. 7). Plaintiffs pray for relief in the form of (1) treble damages and, (2) restraining and enjoining Defendants from engaging in further unlawful conduct under 15 U.S.C. § 1. (Complaint p. 10).

The undisputed facts are as follows:

Each of the Defendants sell title insurance in the states of Arizona and Wisconsin. Plaintiffs allege that the "Defendants entered into a contract, combination or conspiracy to fix, stabilize and maintain at agreed-upon prices levels charges for title search and examination services," commencing "at some time prior to 1981."

These same Defendants were part of a prior settlement judgement involving similar claims. *See In re Real Estate Title and Settlement Serv, Antitrust Litig.*, 1986-1 Trade Cas. (CCH) ¶ 67,149 (E.D. Pa. 1986), *aff'd without opinion*, 815 F.2d 695 (3rd Cir. 1987), *cert. denied*, 108 S. Ct. 1085 (1988) (hereinafter "MDL 633"). The Final Order in MDL 633 dismissed with prejudice:

> [A]ll claims . . . as against defendants, their respective parents, subsidiaries, agents, officers, directors and employees, arising under the laws of the United States or of any State or other jurisdiction that are based on, relate to or arise out of any allegations that any of them agreed or conspired to fix, raise, maintain, stabilize, or otherwise affect the process of title insurance, including title search and examination and/or settlement services.

The class certified in MDL 633 consisted of:

> All Purchasers and insureds who purchased or received title insurance, including search and examination and/or settlement services, from any title insurance underwriter (whether or not a defendant herein) or any agent or such underwriter with respect to real estate located in any of the thirteen Affected States [including Arizona and Wisconsin] during the period from January 1, 1981 to December 31, 1985 inclusive.

Plaintiff Walter Thomas Brown, an Arizona citizen, claims that he purchased title search and examination

services from one of the Defendants on or about August 10, 1983. Plaintiff Jeffrey L. Dziewit, a Wisconsin citizen, claims that he purchased title search and examination services from one of the Defendants on or about December 27, 1984. The purported class these Plaintiffs claim to represent consists of "all persons . . . who purchased title search and examination services from Defendants between January 7, 1981 to the present time." There has not been a motion to certify the class; nor has the class been certified at this time.

Defendants moved for summary judgment on the basis of *res judicata*, due process and the Filed-Tariff Doctrine, articulated in *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156 (1922).

II. Summary Judgment Standard

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "One of the principle purposes of the summary judgment rules is to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). A motion for summary judgment against a party is appropriate when that party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. The court must view the evidence presented on the motion in the light most favorable to the opposing party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

III. Discussion

Defendants' Motion for Summary Judgment should be granted under the doctrine of *res judicata*. Plaintiffs allege that they represent a class injured by the unfair price-fixing of Defendants. Defendants argue that the settlement in MDL 633 bars Plaintiffs' claims under *res judi-*

cata. However, *res judicata* will have no preclusive effect if the current plaintiffs were not adequately represented in the prior action or there was a violation of due process. *Hansberry v. Lee*, 311 U.S. 32 (1940); *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987); *Haas v. Howard*, 579 F.2d 654 (1st Cir. 1978); *Valerie v. Boise Cascade Corp.*, 80 F.R.D. 626 (D.Cal. 1978), *aff'd*, 645 F.2d 699 (9th Cir. 1981), *cert. denied*, 454 U.S. 1126. Indeed, the Third Circuit Court of Appeals recognized that absent plaintiffs in the MDL 633 litigation could raise the issue of adequate representation in the forum of their choice. *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760 (3rd Cir. 1989).

Plaintiffs contend that *res judicata* does not preclude their lawsuit because the "representatives in MDL 633 failed to prosecute or defend the action with due diligence and reasonable prudence and the opposing party was on notice of facts making that failure apparent." In particular, Plaintiffs allege that the plaintiffs' attorneys in MDL 633 were unaware of Judge Muecke's decision in *United States v. Title Insurance Rating Bureau of Arizona*, 517 F. Supp. 1053, 1059 (D. Ariz. 1981), *aff'd*, 700 F.2d 1247, 1253 (9th Cir. 1983). Plaintiffs contend that Judge Muecke's decision should have acted as collateral estoppel during the MDL 633 litigation. Plaintiffs argue, therefore, that the attorneys' unawareness of Judge Muecke's decision was a failure to prosecute the class action with due diligence and reasonable prudence.

A. Plaintiffs' Assertion of Offensive Collateral Estoppel

In *United States v. Title Insurance Rating Bureau of Arizona*, two plaintiffs filed suit against the Title Insurance Rating Bureau, its members and subscribers, alleging that the defendants engaged in an unlawful conspiracy in violation of antitrust laws. Judge Muecke found that the Title Insurance Rating Bureau, its members and subscribers were not entitled to state action defenses, articu-

lated in *Parker v. Brown*, 317 U.S. 341 (1943). This decision was reached by applying the standards announced in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). Judge Muecke held that a requirement for state action immunity as articulated in *Goldfarb* and *Cantor* was state "compulsion," by statute or regulation, of the private conduct. In essence, the State had to dominate the decision-making, significantly diminishing the private party's freedom of choice. Applying this standard, Judge Muecke held no state action immunity applied because Arizona did not compel uniform rate filing and the legislative history of A.R.S. section 20-375 suggested that the State had no intention of supplanting competition.

The Ninth Circuit affirmed. However, the Ninth Circuit applied a slightly different analysis. In 1980 the Supreme Court restated the requirements for state action immunity in *California Retal Liquor Dealers Association v. Midcal Aluminum*, 445 U.S. 97 (1980). First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy;" second, the policy must be "actively supervised" by the State. *Id.* at 105.

The Ninth Circuit only evaluated Arizona's Title Insurance regulations under the first requirement: whether the Arizona legislature had a clearly articulated and affirmatively expressed state policy to restrict competition. The court found there was no such policy, based on two findings. First, the statute itself "reflect neutrality by the Arizona legislature to competition and uniform rates, not a clearly articulated and affirmatively expressed state policy." Second, and "[i]mportantly, the state does not require uniform rates: it allows a title insurer to file independent rates separately, to file independent rates through a rating bureau, or to deviate from rates filed by a rating bureau on its behalf." *United States v. Title Ins. Rating Bureau of Ariz.*, 700 F.2d at 1253. Based on these conclusions, the Ninth Circuit did not consider

whether Arizona actively supervised its anticompetitive policy, the second factor for *Parker v. Brown* immunity. *Id.*

But for the intervening decision of the United States Supreme Court in *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985), the MDL 633 Defendants would have been bound by the Ninth Circuit's decision in *United States v. Title Ins. Rating Bureau of Ariz.*, 700 F.2d at 1253. *Southern Motor Carriers* altered the standard of the state action immunity doctrine. Specifically, *Southern Motor Carriers* held that a state policy that "expressly permits, but does not compel anticompetitive conduct" is not fatal to a claim of *Parker* immunity. 471 U.S. at 61-62.

Plaintiffs argue that *United States v. Title Insurance Rating Bureau of Arizona* would have been binding in the MDL 633 litigation on collateral estoppel grounds despite the intervening decision in *Southern Motor Carriers*. Such would be the case if Plaintiffs were relying on *res judicata* to bind the Defendants in MDL 633. *See Federated Dept Stores, Inc. v. Moitie*, 452 U.S. 394, 400-02 (1981). However, the public policy behind promoting an end to litigation by binding parties to earlier decisions despite changes in the law takes a dramatic turn when a stranger to the prior litigation attempts to collaterally estop the losing party in the prior litigation. Applying a literal interpretation of *Moitie* to such a situaton would allow strangers to bind losing parties to outdated principles of law and would delay evolution of the law and potentially deny parties of their due process rights. Such a result would amount to an unfair application of offensive collateral estoppel. For these reasons, the United States Supreme Court has stated that collateral estoppel "is not meant to create vested rights in decisions that have become obsolete or erroneous with time. . . ." *Montana v. United States*, 440 U.S. 147, 161 (1979) (quoting *Commissioner of Internal Revenue v. Sunnen*,

333 U.S. 591, 599 (1948)). In addition, the Court, in allowing the use of offensive collateral estoppel, gave district courts "broad discretion to determine when it should be applied." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979). Thus, even assuming collateral estoppel could have been asserted, the district court's reliance on *Southern Motor Carriers* in MDL 633 is a strong indicator that the court would not have exercised its discretion to allow the class-action plaintiffs to use offensive collateral estoppel against the defendants following an important change in the law. Thus, Plaintiffs' claims that the decisions in *United States v. Title Insurance Rating Bureau of Arizona* should have collaterally estopped the MDL 633 litigation are unfounded.

Moreover, collateral estoppel only applies if the basis of the first court's decision is clear. *See* Restatement (Second) of Judgments § 27(g) (1982). One of the reasons for Judge Muecke's ruling, and perhaps the primary reason for the Ninth Circuit's ruling, was Arizona's lack of compulsion. It is also unclear whether Judge Muecke considered the "active state supervision" requirement articulated in *Midcal*, 445 U.S. at 105. Instead, Judge Muecke appeared to have issued his opinion by looking at Arizona's intent to replace competition and Arizona's lack of compulsion. *United States v. Title Ins. Rating Bureau of Ariz.*, 517 F. Supp. at 1059. The Ninth Circuit never considered the "active supervision" requirement. *United States v. Title Ins. Rating Bureau of Ariz.*, 700 F.2d at 1253.

Furthermore, the degree of persuasiveness each court attached to Arizona's statute and legislative history is unclear. Instead, both courts emphasized that Arizona lacked "compulsion." *United States v. Title Insurance Rating Bureau of Ariz.*, 517 F. Supp. at 1059 ("In three separate provisions the legislature provides that a title insurer has the choice of filing its own escrow rates or having its rates filed by a rating organization."), *aff'd*,

700 F.2d at 1253 ("Importantly, the state does not require uniform rates. . . .").

In short, the basis for the decisions in *U.S. v. Title Ins. Rating Bureau of Arizona* are either unclear or were later modified by *Southern Motor Carriers.* Moreover, the district court in the MDL 633 action relied on *Southern Motor Carriers* in approving the settlement. MDL 633, 1986-1 Trade Cas. (CCH) ¶ 67,149 at 62,922-23, 62,932, 62,936. Thus, collateral estoppel clearly would have been inappropriate in the MDL 633 litigation. *See Montana v. United States,* 440 U.S. at 161; *Parklane,* 439 U.S. at 331.

Plaintiffs' final arguments in support of their assertion that they were not adequately represented are not persuasive. First, the "dearth of discovery" in the MDL 633 action does not necessarily warrant reopening the action. Decisions regarding the extent of discovery to be taken in a class action will depend heavily on the expense involved and the prospective gains to be reaped. In the MDL 633 litigation, all the parties were particularly concerned about the applicability of the state action defense. As noted below, the MDL 633 plaintiffs had good reason to be wary of the state action defense. The applicability of the state action defense also vindicates the MDL 633 court's evaluation of the fairness of the settlement. Finally, the ruling of the Arizona Court of Appeals against the Tucson Unified School District, discussed *infra,* greatly undermines Plaintiff's argument that the MDL 633 court improperly rejected the arguments made by the objecting states, including Arizona, that the settlement should not be approved because of the differing regulatory schemes among the states.

Therefore, Plaintiffs have failed to make a showing sufficient to establish the existence of inadequate representation, which is an element essential to their case, and on which they will bear the burden of proof at trial. *See Celotex,* 477 U.S. at 322. Consequently, this Court

finds that no genuine issue of material fact exists with regard to whether the representatives in MDL 633 prosecuted with due diligence and reasonable prudence. *See id.* This Court finds that the settlement in MDL 633 is not subject to collateral attack on the grounds of inadequate representation.

B. Defendants' Assertion of Res Judicata

The remaining question is whether the MDL 633 litigation creates a bar to the present litigation on *res judicata* grounds. Under the doctrine of *res judicata,* a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. *Parklane,* 439 U.S. at 326 n.5 (1979).

Defendants admit that they are the same Defendants that were in MDL 633. The named Plaintiffs, Brown and Dziewit, claim to have purchased title insurance in 1983 and 1984, respectively. The MDL 633 class consisted of:

> All Purchasers and insureds who purchased or received title insurance, including search and examination and/or settlement services, from any title insurance underwriter (whether or not a defendant herein) or any agent or such underwriter with respect to real estate located in any of the thirteen Affected States during the period from January 1, 1981 to December 31, 1985 inclusive.

Accordingly, the named Plaintiffs are part of the MDL 633 class.

In addition, the claims are the same. The Complaint alleges a combination and conspiracy among the Defendants to "fix, stabilize and maintain at agreed-upon price levels charges for title search and examination services." The Final Order in MDL 633 dismissed with prejudice:

> all claims . . . as against defendants, their respective parents, subsidiaries, agents, officers, directors, em-

> ployees, arising under the laws of the United States or of any state or other jurisdiction that are based on, relate to or arise out of any allegations that any of them agreed or conspired to fix, raise, maintain, stabilize, or otherwise affect the prices of title insurance, including title search and examination and/or settlement services.

MDL 633 Final Order. Therefore, the requirements for *res judicata*, identity of parties and claims, have been fulfilled and Defendants are entitled to summary judgment against the named Plaintiffs. Because the named Plaintiffs' claims are barred by the MDL 633 judgment, their inadequacy as class representatives mandates dismissal of this entire lawsuit. *Peltier v. Exxon Corp.*, 527 F.2d 757, 760 (9th Cir. 1975) (upholding dismissal of class action suit due to facial inadequacy of purported class representative).

Plaintiffs also argue that due process was violated because the MDL 633 court did not have personal jurisdiction over Arizona and Wisconsin residents, and that the MDL 633 decision therefore could not be binding against them. Relying upon *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), Plaintiffs claim that due process requires that Arizona and Wisconsin residents be permitted to opt-out before being bound to the MDL 633 class.

In *Shutts* the United States Supreme Court held that "a forum state may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant." *Shutts*, 472 U.S. at 811-12. The Court continued: "If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process." *Id.* at 811. *Shutts* raised an issue regarding the state of Kansas' authority to bind non-resident class members without alowing them to opt-out of the class. The Supreme Court held that Kansas state procedures satisfied due process when a fully descriptive notice was sent by first-class mail to each member with an explanation of their right to opt-out of the class. The Supreme Court limited its decision "to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money damages. *Shutts*, 472 U.S. at 811 n.3.

Shutts is distinguishable from the case at hand. The MDL 633 class was certified pursuant to Rules 23(b)(1) and 23(b)(2) of the Federal Rules of Civil Procedure, which do not provide the right to opt-out. The class in *Shutts* was certified under Kansas law. Consequently, contrary to what Plaintiffs suggest, the Court did not decide that absent class members, certified pursuant to Rules 23(b)(1) and 23(b)(2) must be permitted to opt-out in order to extinguish a claim for money damages or similar relief. Thus, the *Shutts* decision is limited to claims for money damages. In MDL 633 the class lawyers dropped all of their damage claims and reached a settlement containing equitable relief. For this reason, the application of *Shutts* to the present case is dubious.

Even if *Shutts* is applicable, that decision held that absent class members, lacking minimum contacts with the forum state, could be bound as long as minimal procedural due process was satisfied. *Shutts*, 472 U.S. at 811-12. The Plaintiffs raise no facts suggesting that the court presiding over MDL 633 failed to satisfy minimal procedural due process. Both parties' Statements of Facts admit that the MDL 633 judge ordered defendants to publish notice of the proposed settlement in 36 listed publications in the affected states, including Arizona and Wisconsin, on two separate days. Class members objecting to the proposed settlement were to file written objections to the court. In *Shutts*, the Supreme Court held that procedural due process was satisfied when a "fully descriptive notice" was mailed to each class member. *Shutts*, 472 U.S. at 812. Given the complexity of the MDL 633

litigation, notice of the settlement by publication and the opportunity to object to the settlement satisfied minimal procedural due process.

Therefore, the Court finds that Plaintiffs were proper parties to the MDL 633 settlement, that Plaintiffs were adequately represented in the action, and that Plaintiff should be bound to the terms of the MDL 633 settlement. Moreover, even assuming that *res judicata* would not bind the Plaintiffs to the MDL 633 settlement, the Court finds that state action immunity would bar Plaintiffs' claims in this lawsuit.

C. Defendants' State Action Defense

On January 14, 1991, Defendants submitted a Notice of Supplemental Authorities. This notice contained the Third Circuit Court of Appeals opinion in *Ticor Title Insurance Co. v. FTC*, No. 89-3787 (January 9, 1991). This opinion resulted from an appeal by Ticor from an FTC final order, which found Federal Trade Commission Act violations and antitrust violations by five title insurance companies operating in Arizona, Connecticut, Montana, New Jersey, Pennsylvania and Wisconsin. The five title insurance companies involved in the FTC appeal comprise most of the defendants in the case before this Court.

The Third Circuit found that the antitrust violations in Wisconsin and Arizona were barred by the state action doctrine. While not addressed in their Motion for Summary Judgment, Defendants assert this defense in their separate answers. The Third Circuit found that the applicable Arizona and Wisconsin statutes satisfied both prongs of the state action doctrine: (1) Arizona and Wisconsin had clearly articulated state policies to displace competition; and (2) Arizona and Wisconsin actively supervised these anticompetitive policies. Consequently, while not an issue addressed in Defendants' Motion for Summary Judgment, this Court is persuaded that

the Third Circuit Opinion in *Ticor v. FTC* in authority for the present situation. This finding is buttressed by the decision of the Arizona Court of Appeals in *Tucson-Unified School District v. Chicago Title Insurance Company*, 78 Ariz. Adv. Rep. 51 (App. 1991), which involved similar, if not identical, claims against the same Defendants involved in this lawsuit and MDL 633. In that case, the court noted that "[r]ate-making by title insurance rating bureaus is specifically authorized by Arizona law." *Id.* at 52. The court relied in part on *Southern Motor Carriers* in holding that Arizona's regulation of the insurance industry placed the Defendants' alleged activity beyond the reach of Arizona's antitrust laws. *Id.* at 52-53.

On February 11, 1991, Plaintiffs provided the Court with a recent Ninth Circuit case that they contend is contrary to *Ticor v. FTC*. In *Lancaster Community Hospital v. Antelope Valley Hospital District*, 60 Antitrust & Trade Reg. Rep. (BNA) 174, 175 (9th Cir. Jan. 18, 1991), the court hold that district courts "are to focus on whether the state's policy in to supplant or support competition in the area of dispute" in determining whether state action immunity applies. Plaintiffs contend that Arizona intended to promote, rather than replace, competition in the insurance industry. However, the Plaintiffs' position is contrary to the holding in *Tucson Unified School District v. Chicago Title Insurance Company*. Moreover, the *Lancaster* decision involved the application of municipal state action immunity, which is governed by *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). This case involves the application of private state action immunity, which is governed by *Southern Motor Carriers*. The Ninth Circuit relied heavily on *Town of Hallie* in deciding *Lancaster*, but did not even mention *Southern Motor Carriers*, which the United States Supreme Court decided the same day as *Town of Hallie*. Thus, *Lancaster* clearly does not govern the outcome in this case.

The Court finds that *Ticor v. FTC* and *Tucson Unified School District* are persuasive authority in this case, and further finds that *Lancaster* is inapposite. Therefore, even if *res judicata* would not bar Plaintiffs' cause of action, the state action doctrine would be a bar.

CONCLUSION

The Court finds that *res judicata* bars the Plaintiffs from asserting the present action because they were proper parties to the MDL 633 settlement. Further, the Court finds that the state action doctrine would operate as a bar to Plaintiffs' claims even if *res judicata* were inapplicable.

IT IS THEREFORE ORDERED granting Defendants' Motion for Summary Judgment (Doc. #27).

DATED this 1st day of March, 1991.

[Signed]
Stephen M. McNamee,
United States District Judge

Copies to all counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MDL Docket No. 633;
All Cases

IN RE REAL ESTATE TITLE and
SETTLEMENT SERVICES
ANTITRUST LITIGATION

[1986-1 Trade Cas. (CCH) ¶ 67,149]

MEMORANDUM OPINION AND ORDER

VANARTSDALEN, J. June 10, 1986

This action, MDL No. 633, results from twelve separate antitrust class actions which were originally filed in the United States District Courts in the Eastern and Middle Districts of Pennsylvania, the Southern District of New York, the Central District of California and the District of Oregon. The twelve actions were consolidated and transferred, where necessary, to this court by the Judicial Panel on Multidistrict Litigation in orders dated March 20, 1985, April 19, 1985 and May 8, 1985, pursuant to 28 U.S.C. § 1407.[1]

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[1] Three of the original twelve plaintiffs, Public Storage, Inc., 159-161 Stanton Street Realty Corp. and Bernard Koch, have stipulated that their claims be dismissed without prejudice. See Stipulation and Order dated June 14, 1985 (dismissing Public Storage, Inc.); Stipulation and Order dated August 13, 1985 (dismissing 159-161 Stanton Street Realty Corp.); and Order dated May 15, 1985 (dismissing Bernard Koch).

The plaintiffs allege that the six defendant title insurance companies (defendants), Chicago Title Insurance Company, First American Title Insurance Company, Lawyers Title Insurance Corporation, Safeco Title Insurance Company, Stewart Title Guaranty Company and Ticor Title Insurance Company, combined and conspired in violation of the federal antitrust laws to fix prices for title search and examination services and for settlement services in thirteen states: Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Wisconsin and Wyoming (the affected states). The plaintiffs allege that defendants accomplished this combination and conspiracy through membership in state-authorized rating bureaus, which submitted prices for title search and settlement services for approval by the insurance departments in each of the thirteen affected states. The filing of the civil actions followed the initiation of an enforcement proceeding against the six defendants by the Federal Trade Commisison (FTC), alleging substantially similar conduct and involving the same thirteen states.[2]

The defendants, in their answers to the individual complaints, denied liability and denied that plaintiffs or any members of the proposed class had suffered any damages. The defendants also raised numerous, affirmative defenses to the complaints. In particular the defendants have consistently contended that they were protected against antitrust liability for their rating bureau activities by virtue of the McCarran-Ferguson Act, 15 U.S.C.

[2] After the Supreme Court's decision in *Southern Motor Carriers Rate Conference, Inc. v. United States*, —— U.S. ——, 105 S. Ct. 1721 (1985), the FTC dropped its claims against the six defendants arising from their conduct in Louisiana, New Mexico, New York, Oregon and Wyoming. The FTC significantly reduced the scope of its action against the six defendants in Pennsylvania and New Jersey. The FTC has maintained its action against the six defendants in Arizona, Connecticut, Montana, Idaho, Ohio and Wisconsin.

§ 1011-15, which exempts the business of insurance from the coverage of the antitrust laws, and the state action doctrine, which in general prevents the imposition of antitrust liability for activities conducted pursuant to state law. The defendants also contend that under the filed-tariff doctrine, plaintiffs and the members of the proposed class were not entitled to damages.

On March 27, 1985, the same day that the Judicial Panel on Multidistrict Litigation's first order transferring and consolidating the individual cases as MDL-633 was filed in this court, the United States Supreme Court decided *Southern Motor Carriers Rate Conference, Inc. v. United States*, —— U.S. ——, 105 S. Ct. 1721 (1985), which substantially redefined the principles governing the state action doctrine as applied to state authorized rating bureau activities. The Supreme Court in *Southern Motor Carriers* held that the state action defense to antitrust liability for rating bureau activity is established if (1) the state has a clearly articulated and affirmatively expressed policy permitting defendants' challenged conduct; and (2) the state actively supervises such conduct. The *Southern Motor Carriers* decision extended the state action doctrine to situations where the collective rate making conduct was permitted but not compelled by state law. The plaintiffs and their counsel could not reasonably have foreseen the Supreme Court's *Southern Motor Carriers* decision at the time they commenced this litigation or the severe negative impact it would have on their claims. As noted, after the *Southern Motor Carriers* decision, the FTC dropped its claims against the defendants for their rating bureau activities in the states of Louisiana, New Mexico, New York, Oregon and Wyoming and greatly limited the scope of the action against defendants in New Jersey and Pennsylvania. In the remaining six states, Arizona, Connecticut, Idaho, Montana, Ohio and Wisconsin, the FTC is apparently arguing that the state action doctrine does not apply to defendants rating bureau activities because the FTC contends those states did

not actively supervise the activity. Memorandum of Defendants Addressing Objections to Proposed Settlement Agreement, April 8, 1986 (Defendants' Memorandum), p.5.

Because of what I then viewed, and still view, as the possibly dispositive effect of the *Southern Motor Carriers* decision on this litigation, on May 20, 1985 I ordered that proceedings in this matter be limited to discovery on the narrow issue of whether the state action doctrine as set out in *Southern Motor Carriers* defeated plaintiffs' claims. Memorandum Opinion and Order No. 1 (Order No. 1), dated May 20, 1985, ¶¶ 16-17. I further ordered that discovery on the state action defense was to be completed by October 1, 1985, and defendants were permitted to file a joint consolidation motion for summary judgment on the state action doctrine on or before October 10, 1985. *Id.* at ¶¶ 3, 17. I specifically ordered plaintiffs not to file a motion for class certification until after disposition of the joint motion for summary judgment, *Id.* at ¶ 18. The May 20, 1985 order also established the procedures to be followed in the multidistrict litigation and appointed Allen D. Black, Esquire, of Fine, Kaplan and Black, as liaison counsel for plaintiffs and Peter Hearn, Esquire, of Pepper, Hamilton and Scheetz, as liaison counsel for defendants. *Id.* at ¶¶ 6-7.

It was, and still is, my understanding that all of the thirteen affected states have statutes which explicitly permit collective ratemaking, thus satisfying the first prong of the state action doctrine. Order No. 1 at p.4. As the result of my May 20, 1985 Memorandum Opinion and Order, the plaintiffs engaged in extensive discovery, particularly focusing on whether the affected states actively supervised the defendants' rate-making activities, the second prong of the state action doctrine. Affidavit of Allen D. Black, Esq., Relating to Plaintiffs' State Action Discovery Efforts (Black Affidavit re State Action Discovery), ¶ 4. Plaintiffs prepared comprehensive state action discovery requests directed at the six defendants, and document and deposition subpoenas were issued for the insurance departments and rating bureaus in the thirteen affected states. Black Affidavit re State Action Discovery at ¶¶ 6-7. Several hundred thousand documents relating to the supervision of title insurance rate filings were produced to plaintiffs by these entities. *Id.* at ¶ 11. These documents were distributed to the particular plaintiffs' counsel assigned to consider the state action defense in each state, and reviewed and analyzed by counsel. *Id.* at ¶ 12.

Plaintiffs interviewed numerous persons with knowledge relating to the title insurance industry and title insurance regulation, including insurance department personnel in the affected states, several experts with substantial experience in the title insurance field, the Attorney Generals' offices and watchdog agencies in several states, former employees at certain rating bureaus, and other persons with information relating to the operation of the major title insurance underwriters. *Id.* at ¶ 8. Plaintiffs also reviewed the publications of the American Land Title Association, which is the national trade association for the title insurance industry, and many of the independent trade associations which operated in the affected states, as well as the transcripts of hearings, reports and other publications of the National Association of Insurance Commissioners. *Id.* at ¶ 9.

As part of their discovery effort, plaintiffs filed a motion seeking to compel defendants to respond to interrogatories pertaining to possible instances of the inclusion of referral payment costs in rate submissions, payments to employees of state insurance departments and investigations into any such payments. Plaintiffs argued that the evidence that they sought through the interrogatories about improper influence and the inclusion of the cost of unlawful referral payments in rate submissions would have been relevant as tending to show that there was not active state supervision of the allegedly anticompetitive rating-bureau activities of the defendants. I ruled,

however, that the "active state supervision" element of the state action defense focuses on the required procedures by which the state controls the challenged setting of prices, not on the behavior or effectiveness of individual state employees in carrying out those procedures. Memorandum and Order No. 2 (Order No. 2), dated September 9, 1985. The decision denying plaintiffs' discovery motion further eroded plaintiffs' chances of succeeding on their claims by effectively curtailing the permissible scope of the contention that there was a lack of active state supervision. *Id.* at ¶ 14.

Negotiations regarding a possible settlement of this litigation began soon after the Supreme Court's decision in *Southern Motor Carriers* and continued throughout the state action discovery period. Affidavit of Allen D. Black Relating to Negotiations Leading to the Agreement of Settlement (Black Affidavit re Settlement Negotiations), ¶ 2. The negotiations were conducted on behalf of plaintiffs by Allen D. Black and Robert N. Kaplan, who were designated as Chairman and Vice-Chairman, respectively, of Plaintiffs' Executive Committee in my Order No. 1, dated May 20, 1985. Black Affidavit re Settlement Negotiations, at ¶ 3. Both Mr. Black and Mr. Kaplan are experienced and reputable counsel, who have extensive experience and expertise in antitrust and class action litigation. Mr. Black and Mr. Kaplan were selected by plaintiffs' Executive Committee as plaintiffs' sole representatives for purposes of conducting settlement negotiations with defendants and there was no competition from other plaintiffs' counsel to conduct the settlement negotiations or to represent the proposed class. *Id.* at ¶ 4. The negotiations involved seven face-to-face meetings with defendants' counsel and a large number of negotiating sessions conducted by telephone. *Id.* at ¶ 5. Each stage of the settlement negotiations was discussed and agreed upon by plaintiffs' Executive Committee. *Id.* at ¶ 6. All of the negotiations that led up to the settlement were conducted in good faith and at arm's length by plaintiffs' counsel. By early October, 1985, after the relevant documents and interviews in each of the affected states had been reviewed and evaluated by plaintiffs' counsel and after I had denied plaintiffs' motion to compel discovery, an agreement in principle was reached between plaintiffs and defendants to settle the litigation. *Id.* at ¶ 7, 11. On January 8, 1986, after further negotiations, the parties executed an Agreement of Settlement. Prior to its execution, the agreement was approved by plaintiffs' Executive Committee and each of the original named plaintiffs. *Id.* at ¶ 9.

The settlement agreement provides for both monetary and injunctive relief. For purposes of the agreement of settlement only, the defendants agree to stipulate to entry of an order confirming the following class pursuant to Federal Rule of Civil Procedure 23(b)(1) and/or (b)(2):

> All purchasers and insureds who purchased or received title insurance, including search and examination and/or settlement services, from any title insurance underwriter (whether or not a defendant herein) or any agent of such underwriter with respect to real estate located in any of the thirteen Affected States during the period from January 1, 1981 to December 31, 1985 inclusive.

Agreement of Settlement, dated January 8, 1986, ¶ 4.

The plaintiffs in the original cases which were consolidated in MDL No. 633 are to represent the class. *Id.* at ¶ 5. In paragraph 7 of the settlement agreement, the defendants agree that in "full and complete settlement of the claims asserted in this action against defendants," the following injunction shall be entered:

> A . Each defendant shall be enjoined until December 31, 1987 from joining or participating in any way in any rating bureau in the Affected States; provided that this injunction shall apply in Arizona, Connecticut, Idaho, Montana, Ohio and Wisconsin

regardless of whether any such state has clearly articulated and affirmatively expressed a policy permitting collective rate filing through rating bureaus subject to active supervision by the state; and provided further that this injunction shall not prohibit defendants from joining or participating in a rating bureau in Louisiana, New Jersey, New Mexico, New York, Oregon, Pennsylvania or Wyoming as long as such state has clearly articulated and affirmatively expressed a policy permitting collective rate filing through rating bureaus subject to active supervision by the state. Pending the date upon which the order approving the settlement and entering the injunction becomes final, each defendant agrees to be bound by the terms of this Paragraph 7A.

B. Each defendant shall be ordered affirmatively:

1. To increase by $5,000, without additional charge, the amount of insurance coverage for each title insurance policy for property located in any of the thirteen Affected States that has been issued by that defendant or its agent to an insured member of the Settlement Class during the class period as defined above;

2. With respect to transactions in which members of the Settlement Class did not become insureds of any of the defendants in the class period (either because they purchased title insurance for the benefit of others, or because they purchased title insurance from a non-defendant underwriter or an agent of a non-defendant underwriter), to provide the last $5,000 of insurance coverage without charge in connection with any new title insurace policy purchased from any of the defendants by such a class member for property located in any of the thirteen Affected States within the one year period following the date that the order approving the settlement becomes final; and

3. To make good faith efforts to inform members of the Settlement Class of their entitlement to the provisions described in Paragraph 7(B) at such times as individual class members may be entitled to benefit from such provisions, (i.e., when an insured class member makes a material claim under his policy; or when an insured class member is entitled to a re-issue rate on a new policy and the charge for the new policy is affected by the provisions of Paragraph 7(B)(1); or when a non-insured class member applies to purchase a new policy to which Paragraph 7(B)(2) applies.)

The defendants agree to use their best efforts to get regulatory approval of the settlement in the thirteen affected states. *Id.* at ¶ 10.[3] They also agree to pay "all of the necessary and reasonable expenses, excluding attorneys' fees, of the administration of the settlement" including the cost of Notice by Publication to the class. *Id.* at ¶ 11.

[3] Defendants submitted the proposed settlement to the insurance departments in all of the affected states. The insurance departments in eleven of the thirteen affected states, Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Oregon, Pennsylvania and Wyoming, have written in response that they approve in concept, or do not object to, the proposed settlement. See Defendants' Memorandum, Exhibits B-F and Supplemental Memorandum of Defendants Addressing Objections to the Proposed Settlement (Defendants' Supplemental Memorandum), dated April 23, 1986, Exhibits A-F. The insurance departments in the remaining two states: Ohio and Wisconsin, have not officially stated that they would either approve or disapprove the proposed settlement, though there is some indication that if I approve the settlement, they will allow its implementation. Defendants' Supplemental Memorandum, Exhibits G, H (Affidavits of John F. Graybeal and Erich E. Everbach). Failure to obtain regulatory approval of the settlement agreement in any state will not effect the agreement unless the plaintiffs, in good faith, believe that the failure has materially reduced the benefits to be received by the class as a whole, in which case the plaintiffs are excused from performing their obligations under the settlement agreement. Agreement of Settlement, ¶ 10.

In return for these concessions, the plaintiff class agrees that the final judgment approving the agreement of settlement will dismiss with prejudice

> all claims the Settlement Class may have as against defendants, their respective parents, subsidiaries, affiliates, agents, officers, directors and employees, arising under the laws of the United States or of any state or other jurisdiction that are based on, relate to or arise out of any allegations that any of them agreed or conspired to fix, raise, maintain, stabilize or otherwise affect the prices of title insurance, including title search and examination and/or settlement services.

Agreement of Settlement, at ¶ 13.

Both parties agreed to seek authorization from the court to negotiate an agreement on either the amount of attorney's fees, costs and expenses of litigation to be paid by defendants or a maximum amount of attorney's fees, costs and expenses of litigation for which plaintiffs will apply to the court to be paid by defendants. Agreement of Settlement, ¶ 12. Defendants had the option of terminating the agreement if the parties were unable to negotiate a satisfactory fee award and were unwilling to submit the issue for me to decide. *Id.* Other than plaintiffs' counsel informing defendants' counsel of the approximate number of hours spent by plaintiffs' counsel on the case and the approximate lodestar value of that time, no negotiation of the amount of attorney's fees to be paid was discussed during the settlement negotiations. Affidavit of Allen D. Black Relating to Negotiations with Defendants Concerning Attorneys' Fees, dated April 23, 1986, ¶ 3. By order dated January 29, 1986, I tentatively approved the settlement agreement pending notice to the class and a hearing. I further authorized the parties to negotiate the amount of attorney's fees to be paid by defendants and instructed plaintiffs' counsel to file a fee application. Counsel for plaintiffs and defendants negotiated an agreement whereby

plaintiffs' counsel would apply to the court for attorney's fees and expenses not to exceed $650,000 in counsel fees and $65,000 in litigation expenses. On March 3, 1986, plaintiffs' counsel submitted an attorney's fee petition in conformity with this agreement.

In my January 29, 1986 order, I conditionally certified plaintiffs' proposed class under Federal Rule of Civil Procedure 23(b)(1) and (b)(2), and I directed defendants to provide notice of the proposed settlement agreement to the class by publication in thirty-six listed publications in the affected states on two separate days in February of 1986. The notice set out the description of the conditionally certified class and the terms of the proposed settlement. Order, dated January 29, 1986, Exhibit A. It also set April 10, 1986 as the date for the final hearing on the settlement agreement and instructed those objecting to the settlement to file written objections with the court on or before March 27, 1986, if they wished to challenge the proposed settlement agreement. All inquiries concerning the proposed settlement were to be directed to liaison counsel for plaintiffs or defendants' counsel, Bell, Boyd & Lloyd. Class members could request fee copies of the settlement agreement from Bell, Boyd & Lloyd.

Defendant filed the required proof of publication with the court on March 20, 1986.[4] Counsel for plaintiffs received over two hundred inquiries from class members concerning the proposed class. See Affidavit of Donald L. Perelman Relating to Responses from Class Members to the Notice of Proposed Settlement (Perelman Affidavit), dated April 23, 1986, ¶ 2. Many of these inquiries requested information on how to be included in the proposed class. *Id.* at ¶ 3. Counsel for defendants received over 450 requests for information about the settlement

[4] The aggregate weekday circulation of the thirty-six newspapers in which the notice was published, based on information obtained by defendants' counsel, is 6,250,814. Defendants' Supplemental Memorandum, Exhibit J (Affidavit of Patrick J. Roach), ¶ 4.

and forwarded copies of the proposed settlement agreement to each of the parties requesting information. Defendants' Memorandum, p. 31. Twenty letters from potential class members were filed with the court objecting to the proposed settlement. The Attorneys General of Montana, New Jersey, Ohio, Pennsylvania and Wisconsin (objecting states) filed a joint memorandum in opposition to the proposed settlement on behalf of their respective states as purchasers of title insurance and as parens patriae on behalf of their residents who are class members.[5] The State of Arizona also moved to be excluded from the proposed class on behalf of itself and its residents as *parens patriae*.

On April 10, 1986, I held the scheduled hearing as set forth in the notice of proposed settlement, at which an

[5] Although the objecting states have standing to object to the settlement based on their own purchases of title insurance and settlement services from the defendants, it is not at all clear that they have standing to object on behalf of their residents as *parens patriae*. The antitrust laws, 15 U.S.C. § 15c, permit suits by states as *parens patriae* for monetary damages. In this action, however, the objecting states did not originally bring suit, but rather they merely seek to object to a settlement. The settlement primarily provides injunctive relief, not monetary relief. Section 15c(b) also imposes various procedural requirements, such as notice to the state residents and the right to opt out of the state's action, which have not been complied with in this case. Furthermore, none of the objecting states has indicated that it plans to challenge the defendants' rating-bureau activities in their own respective states or elsewhere under 15 U.S.C. § 15c if they are successful in objecting to the settlement. In fact, one objecting state, Pennsylvania, has filed an amicus curiae brief in the action by the FTC, challenging the action against the defendants in Pennsylvania and arguing that the Pennsylvania regulatory scheme meets the requirements of *Southern Motor Carriers*. Defendants' Memorandum, Exhibit A (Amicus Curiae Brief of the Commonwealth of Pennsylvania, Insurance Department). Since the objecting states have properly presented their objections to the settlement as class members in their own right, I need not decide whether they have standing to challenge the settlement as *parens patriae* on behalf of their residents, who are members of the class.

opportunity to present evidence was afforded counsel, and argument was heard on the proposed settlement. The only objector who appeared and argued against the proposed settlement at the hearing was Matthew C. Lawry, Assistant Attorney General of Ohio, who represented the objecting states. Neither Mr. Lawry nor any of the other objectors presented any evidence at the hearing. Subsequent to the hearing, both plaintiffs and defendants submitted additional affidavits in support of the settlement and filed proposed findings of fact and conclusions of law.

Having set out the procedural posture of this case leading up to the proposed settlement, I turn to the question of whether, pursuant to Federal Rule of Civil Procedure 23(e), the settlement should be approved. Prior to addressing the adequacy and fairness of the settlement itself, I must consider whether certification of a class under Rule 23(b)(1) and/or (b)(2), as stipulated to in the proposed settlement, is proper. *See Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 832 (3d Cir. 1973) (there is no "impediment to determining class actions for purposes of settlement only").

I. *Class Certification*

Certification of a class under Rule 23(b)(1) and/or (b)(2) first requires that the proposed class meet the prerequisites of Rule 23(a). Rule 23(a) allows certification of a class only if

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The numerosity requirement is easily satisfied in this case. The class, as proposed, is estimated to include more than 3.4 million people. Defendants' Supplemental Memo-

randum, Exhibit I (Affidavit of Robert L. Stratton), ¶ 7. It would clearly be impracticable to attempt joinder of all the members of the proposed class. None of the parties or objectors argue otherwise.

This case presents issues of law and fact common to all of the proposed class members. The primary legal issues in this case are whether plaintiffs' antitrust claims are barred by the state action defense, the McCarran-Ferguson Act and the filed tariff doctrine; or conversely, whether joint filing of rates by the defendant-competitors through rating bureaus as approved by state law, violates the prohibition against price-fixing combinations under the federal antitrust laws. These legal issues are common to the entire proposed class. See *In Re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 335 (E.D. Pa. 1976) ("Antitrust, price-fixing conspiracy cases, by their nature, deal with common legal and factual questions about the existence, scope and effect of the alleged conspiracy"). The primary factual issues in this case would appear to be the extent of each individual defendants' participation in the rating bureaus and the quantum of active supervision of the rate-making process in each state. Although the involvement of the defendants in the rating bureaus and the extent of supervision may vary somewhat in the different affected states, the overall pattern of involvement as it applies to the state action defense is essentially the same. Furthermore, the commonality requirement of Rule 23(a)(2) is not as stringent as that of 23(b)(3) which requires that the common issues predominate in the litigation. See *Wilensky v. Olympic Airways, S.A.*, 73 F.R.D. 473, 477 (E.D. Pa. 1977); 7 C. Wright & A. Miller, *Federal Practice and Procedure* ¶ 1763 at 610 (1972).

Similarly, the claims of the class representatives, the plaintiffs in the individual suits which were consolidated in this litigation, are typical of those of the proposed class since they all involve challenges to defendants' participation in rating bureaus. The defenses raised by de-

fendants against the plaintiffs' claims are also the same as those that are raised against all of the proposed class members.

The objecting states argue that the differences in the regulation of the rating bureaus by the thirteen affected states makes the defendants' state action defense of different strength in each state. They contend that since the strength of defendants' state action defense will vary in each state, the corresponding strength of plaintiffs' claims will also vary in each state and, thus, the representative plaintiffs may not adequately represent the class members in states other than the states in which the class representatives are residents. Although this argument has some superficial appeal, it is flawed as an attack on certification of the proposed class because it is entirely speculative. See *Robertson v. National Basketball Association*, 389 F. Supp. 867, 899 (S.D.N.Y. 1975) ("Class action determination will not be denied, nor will the formulation of subclasses be required in the absence of a showing that the alleged potential conflicts are real probabilities and not mere imaginative speculation."); *Reynolds v. National Football League*, 584 F.2d 280, 286 (8th Cir. 1978) (theoretical conflicts of interest do not "require subclassification, disqualification of the named parties and class counsel, or disapproval of the settlement"). The objecting states, although given ample opportunity, have presented no evidence that the defendants' rating bureau activities were subject to materially different regulations or supervision in any of the affected states. This falure to present evidence is particularly problematic for the objecting states since presumably they are in the best position to provide evidence on the nature of the state regulation of the rating bureaus, at least in their own individual states.

The only objecting state to even address the issue of the nature of its regulation of rating bureaus was Wisconsin. In a letter to the court, dated April 16, 1986, two Assistant Attorney Generals from Wisconsin assert that

the state regulators did not take any regulatory action with regard to the fees for title search and examination submitted to them. They claim that no data or cost justification for the fees was submitted to the regulators from which it could be determined whether the fees were excessive, inadequate or unfairly discriminatory. The first problem I have with the letter from Wisconsin is that it is unsupported by any affidavits and it was never properly filed in this case. The second problem is that even if I accept the assertions in the letter as true, there is no indication whether the failure to actively supervise alluded to in the letter is a result of an inherent inadequacy in the Wisconsin regulatory scheme or merely an isolated example of a breakdown in the proper functioning of the system. As I pointed out in my Memorandum and Order No. 2, dated September 9, 1985, the active state supervision requirement of the state action defense focuses on the procedures by which the state controls the challenged setting of fees, not on the behavior or effectiveness of individual employees in carrying out those procedures. Finally, the defendants, in a reply to the Wisconsin letter, vehemently contest the assertion that Wisconsin does not actively supervise the collective rate-making process. The defendants note that they filed extensive written justifications with their rate proposals and also assert that the deposition evidence before the FTC shows that Wisconsin fully reviewed the submitted rate proposals. Thus, I find that the objecting parties have presented nothing more than a speculative challenge to the typicality of the representative plaintiffs' claims and the proposed class therefore meets the requirements of Rule 23(a)(3).

The final requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Rule 23(a)(4). The Third Circuit Court of Appeals has held that adequacy of representation depends on two factors: "(a) the plaintiff's attorney must be qualified, experienced and generally able to conduct the proposed litigation, and (b) the plaintiff must

not have interests antagonistic to those of the class." *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 247 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). The objectors do not challenge, nor do I question, the expertise and extensive experience of plaintiffs' counsel in litigating complex class actions. The second factor, that plaintiffs not have interests antagonistic to those of the class, is similar to the typicality requirement of Rule 23(a)(3) in that both requirements seek to insure that plaintiffs will properly present the claims of the class members. *Cohen v. Uniroyal, Inc.*, 77 F.R.D. 685, 691 (E.D. Pa. 1977). Plaintiffs' interests in this litigation are not antagonistic to those of the proposed class since the plaintiffs and the proposed class were all allegedly injured by essentially the same alleged illegal rating bureau activities of the defendants. As I found above, the potential differences between the regulation of the challenged rating bureau activities in the different affected states have not been shown to be material differences. I conclude that the requirement of Rule 23(a)(4) has been met in this case.

A. Rule 23(b)(1)

Having satisfied the requirements of Rule 23(a), the proposed class must also come under one or more of the three categories set out in Rule 23(b). The settling parties seek certification under Rule 23(b)(1) and/or (b)(2). I had conditionally certified the proposed class under both Rule 23(b)(1) and (b)(2) in the Order of January 29, 1986, in which I ordered notice of the proposed settlement to be published and in which I scheduled the final hearing on the proposed settlement.

Rule 23(b)(1) requires that:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would

establish incompatible standards of conduct for the party opposing the class or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

The settling parties rely on subsection (A) of Rule 23 (b)(1) and argue that any injunctive relief obtained by plaintiffs in individual actions could subject defendants to inconsistent rulings as to their participation in rating bureaus. I agree that there is a serious risk that courts in separate actions could impose inconsistent obligations on the defendants in trying to fashion injunctive relief that cures any potential antitrust problems that defendants' rating bureau activities were found to cause. This risk goes beyond the ever-present risk in multiple adjudications that one court may find certain activity to violate the antitrust laws and another may find no violation in the same activity. See *Bogosian v. Gulf Oil Corp.*, 62 F.R.D. 124, 132 (E.D. Pa. 1973), *vacated on other grounds*, 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 F.2d 1086 (1978) ("[Rule 23(b)(1)(A)] requires not only 'inconsistent and varying adjudication,' but such adjudications must establish 'incompatible standards of conduct.'"). The risk of the inconsistent restructuring of defendants' rating bureau activities in this case is similar to the risk of inconsistent restructuring of the rules and practices of the National Football League which the court in *Reynolds*, 584 F.2d at 283-84, found sufficient to justify certification of a class under Rule 23(b)(1)(A). Thus I find that certification of the proposed class under Rule 23(b)(1)(A) is appropriate for purposes of the proposed settlement.

B. Rule 23(b)(2)

The settling parties also seek certification of the proposed class under Rule 23(b)(2) which provides for a class action where

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

In this case the proposed plaintiff class is challenging the defendants' rating bureau activities; activities which are generally applicable to the proposed class of title insurance and settlement services purchasers. The injunctive relief contained in the proposed settlement relates directly to the rating bureau activities of the defendants and thus provides a remedy for the class as a whole. Injunctive relief or declaratory relief with respect to the class as a whole would thus be appropriate. This case is properly certifiable under Rule 23(b)(2) since the proposed class seeks to define the defendants' relationship with the world at large by seeking to limit the defendants' rating bureau activities. *See Weiss v. York Hospital*, 745 F.2d 786, 811 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1777 (1985).

The objecting states argue that this action cannot properly be certified under Rule 23(b)(2) since the relief sought by the class is primarily monetary. This argument overlooks the fact that the relief contained in the proposed settlement is primarily injunctive. The plaintiffs, in their original individual actions, had sought treble damages under 15 U.S.C. § 15. However, after re-evaluating their case in light of the *Southern Motor Carriers* decision, they in effect dropped their treble damage claim and now seek approval of the proposed settlement and its injunctive relief provisions. Certification of the proposed class under Rule 23(b)(2) is not precluded by the fact that the settlement provides for some monetary

relief in the form of title insurance policy enhancements, since the primary relief provided is injunctive and since the challenged conduct of the defendants is such that injunctive relief would be appropriate. See *Wetzel*, 508 F.2d at 251 (Class action maintainable under Rule 23 (b)(2) even though monetary relief is sought as well as injunctive relief). Thus I find that for purposes of the proposed settlement, the proposed class can be properly certified under Rule 23(b)(2).

Since I have found that the proposed class is properly certifiable under both Rule 23(b)(1)(A) and (b)(2), I need not consider the objecting states' argument that notice to the class was insufficient under Rule 23(c)(2), or the State of Arizona's request to opt out of the suit under the same section since that section only applies to classes certified under Rule 23(b)(3). See *Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 963 fn.3 (3d Cir. 1983) (No right to opt-out under Rule 23(b)(1) or (b)(2)).

Where an action is properly certifiable under either Rule 23(b)(1) or (b)(2) and Rule 23(b)(3), it has been held to be preferable to certify it under Rule 23(b)(1) or (b)(2) in order to avoid the added procedural requirements of a Rule 23(b)(3) class action. See *Wetzel*, 508 F.2d at 252-53 (if both Rule 23(b)(2) or (b)(3) are applicable, court should use 23(b)(2)), and *Robertson v. National Basketball Association*, 556 F.2d 682, 685 (2d Cir. 1977) (court should use Rule 23(b)(1) when both 23(b)(1) and 23(b)(3) are applicable.) See also 7A C. Wright and A. Miller, *Federal Practice and Procedure* §§ 1772, 1775 (1972).

Both the objecting states and the State of Arizona argue that even if Rule 23(c)(2) is not applicable, due process requires that the proposed class members be provided with more effective notice and be given the opportunity to opt out of the class. These two issues, notice and the right to opt out, are closely related since due

process would probably require that potential class members receive notice comporting with Rule 23(c)(2), including individual notice wherever possible of their right to opt out of the class if I were to require that such an opt-out option be provided in this case. See *Penson v. Terminal Transport Co.*, 634 F.2d 989, 994-95 (5th Cir. 1981) (notice of a proposed consent decree to member of a 23(b)(2) class inadequate where it failed to alert class member that consent decree contained an opt-out provision). However, if I decide that no opt-out provision is required, then the notice required by Rule 23(c) in this case, as in any other class action under Rule 23(b)(1) or (b)(2), "need only be such as to bring the proposed settlement to the attention of representative class members who may alert the court to inadequacies in representation, or conflict in interest among subclasses, which might bear upon the fairness of the settlement." Walsh, 726 F.2d at 963. I see no need in the present case to require that class members be permitted to opt-out of the proposed settlement. The rights of the proposed class are adequately protected by the Rule 23 requirements that the class be adequately represented by the representative plaintiffs and by qualified counsel, that the class receive some adequate form of notice of the proposed settlement and that the court approve the settlement only if it is fair, adequate and reasonable. *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 507-08 (5th Cir. 1981); *Robertson*, 556 F.2d at 685-86.

I also note that the benefits of the proposed settlement are provided to the class members without any affirmative action on their part. Thus, they need not have actual notice of the settlement to benefit from it. See *Greenfield*, 483 F.2d at 833 (Published notice inadequate where class members had to affirmatively file a claim in order to obtain settlement benefits.).

Furthermore, I would not exercise any discretion I may have to require an opt-out provision in this case because to do so would go against the strong public policy in

favor of settlement of class actions. See *Cotton v. Hinton,* 559 F.2d 1326, 1331 (5th Cir. 1977) ("Particularly in class action suits, there is an overriding public interest in favor of settlement."). It is, in my view, highly unlikely that defendants would agree to settle this case if they would still face the prospect of having to defend against one or more suits on these same issues by parties who had opted out of the settlement. Given my pessimistic view of plaintiffs' chances of any recovery by way of either injunctive or declaratory relief or the award of monetary damages in this case after the *Southern Motor Carrier* decision, I would anticipate that the end result of the failure to settle this case would be the failure of any of the proposed class members to receive any recovery either monetary or injunctive against the defendants for any alleged antitrust violation. I find that, based on the objections to the settlement which I received and the presentation by Mr. Lawry on behalf of the objecting states at the April 10, 1986 hearing, that the published notice required by my order of January 29, 1986, which appeared in thirty-six newspapers in the affected states with a combined circulation of over six million, served its purpose under Rule 23(e) as set out in Walsh.[6] There-

[6] Each of the defendants has submitted an affidavit describing the difficulties that would be faced in trying to mail individual notice of the proposed settlement to the class members. Defendants' Memorandum, Exhibits H-M. Due to the nature of the title insurance business, the defendants do not keep current address lists of their insureds or of the purchasers of title insurance who often buy title insurance for the benefit of others. Even an exhaustive and time-consuming search of all the defendants' files, which are not centrally located, would not produce a complete or accurate list of the plaintiff' class or their addresses. The expense of requiring the defendants to provide individual notice to class members, assuming that it was even possible to provide such notice, would probably result in defendants withdrawing from the settlement. The settlement agreement itself provides defendants with an option to withdraw from the settlement if the court orders notice which would be substantially more expensive than the notice by publication agreed to by the settling parties. Agreement of Settlement, ¶ 6.

fore, this action can be properly certified under Rule 23(b)(1) and (b)(2) without an opt-out provision and without further notice to the class.

II. *Approval of the Settlement*

Having determined that the proposed class can be properly certified under Rule 23(b)(1) and (b)(2), I now turn to the question of whether I should approve the settlement reached by the representative plaintiffs and the defendants. In deciding whether to approve a settlement under Rule 23(e), I must determine whether the settlement is fair, adequate and reasonable. *Walsh,* 726 F.2d at 965 (3d Cir. 1983). The Third Circuit Court of Appeals in *Girsh v. Jepson,* 521 F.2d 153, 156-57 (3d Cir. 1975), borrowing from the Second Circuit's opinion in *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir. 1974), set out some of the relevant factors to be used in determining the fairness of a proposed settlement:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

In the view of the Second Circuit in *Grinnell,* the last factor, which subsumes many of the others, is the most important in judging the settlement. *Grinnell,* 495 F.2d at 455. See also *Kusner v. First Pennsylvania Corp.,* 74 F.R.D. 606, 608 (E.D. Pa. 1977), *aff'd,* 577 F.2d 726 (3d Cir. 1978) (quoting *Grinnell*).

Another important consideration in evaluating the fairness of the settlement, and one which directly influences my acceptance of the parties' presentation of the settlement in this case, is whether or not I find evidence of collusion among the parties, or whether the settlement was truly an arm's-length negotiated agreement. See *Cotton*, 559 F.2d at 1330 (5th Cir. 1977) ("Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel."); *In Re Montgomery County Real Estate Antitrust Litigation*, 83 F.R.D. 305, 315 (D. Md. 1979) ("The factors tending to reveal the 'fairness' of a settlement are those which indicate the presence or absence of collusion among the parties."). One of the primary goals of the inquiry into the fairness, adequacy and reasonableness of the settlement is to insure that absent class members are not being unfairly deprived of the prospect of a reasonable recovery and that their interests were adequately represented by the class representatives. *Robertson v. National Basketball Association*, 72 F.R.D. 64, 68 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977). However, in reviewing the fairness of the settlement and considering the objections of the class members I must avoid making the settling parties "justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes." *Milstein v. Werner*, 57 F.R.D. 515, 524-25 (S.D.N.Y. 1972). My role is to approve or disapprove the settlement as negotiated by the parties, not to rewrite it to conform with my own view of an ideal settlement, or that of any of the objectors. *Armstrong v. Board of School Directors*, 616 F.2d 305, 315 (7th Cir. 1980). Compromise is the essence of a settlement and as long as the compromises reached by the parties place the settlement within the range of settlements which are reasonable given the facts of the case, the settlement

should be approved. See *In Re Corrugated Container Antitrust Litigation*, 659 F.2d 1322, 1324-25 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982).

The first, and perhaps most important, factor I will examine is whether the settling parties negotiated the settlement in good faith. This factor is critical because in order to avoid the necessity of conducting a trial on the merits in approving a settlement it is necessary for the court to rely in substantial part on the evaluations of the case made by counsel. This reliance is only justified if counsel for the parties have negotiated the settlement at arm's length and in good faith. See *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983). In the present case, in Order No. 1, dated May 20, 1985, an Executive Committee of Plaintiffs' Counsel was established and Allen D. Black and Robert N. Kaplan were appointed respectively as Chairman and Vice-Chairman. All negotiations on behalf of the plaintiffs were carried out by these two with the consent of the Executive Committee. Black Affidavit re Settlement Negotiations, ¶¶ 3, 6. This procedure avoided competition among plaintiffs' counsel to negotiate the settlement and allowed the plaintiffs to present a unified position to the defendants, thus avoiding some of the difficulties encountered when a settlement is negotiated by separate plaintiffs' counsel prior to class certification. *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 33 (3d Cir. 1971). Both Mr. Black and Mr. Kaplan are able and experienced counsel and fully capable of adequately representing the class' interests and of negotiating a fair settlement. Discovery on the crucial issue of the applicability of the state action defense in the affected states had progressed sufficiently for plaintiffs' counsel to make an intelligent assessment of the strengths and weaknesses of their case prior to entering into extensive negotiations. I have noted earlier the extensive discovery efforts on the state action defense issue made by plaintiffs' counsel after my order limiting discovery to

that issue. Furthermore, in the course of my supervision of the case, I have been impressed with plaintiffs' counsels' diligence in pursuing the class's interests, and I have seen no evidence of any collusion between the parties as to any aspect of this case or in their settlement negotiations. Contested motions were presented to the court by the respective parties in a genuinely adversarial posture. Plaintiffs' counsel, Allen Black, in a sworn affidavit, has attested to the fact that the negotiations were "conducted in good faith and at arm's length." Black Affidavit re Settlement Negotiations, ¶ 10.

The objecting states argue that the shift from bringing this case as a Rule 23(b)(3) class action for treble damages to settling it as a Rule 23(b)(1) and (b)(2) class action providing essentially only injunctive relief, and the form of notice provided indicates some form of improper conduct on the part of plaintiffs' counsel. I reject these suggestions. First, both the certification of the class and the form of notice to the class required and received court approval. Second, the shift from a Rule 23(b)(3) class to a Rule 23(b)(1) and (b)(2) class was brought about by a concomitant shift from an action seeking treble damages to an action seeking primarily injunctive relief. That shift was the result of plaintiffs' counsels' reasonable reassessment of the strength of the case after the decision in *Southern Motor Carriers*. I find nothing in either the class certification or the notice to the class to indicate that plaintiffs' counsel was acting in anything but the best interests of the class. The objecting states also question the fact that the class in this case was not certified until after the settlement had been negotiated. However, as I noted above, the appointment of an Executive Committee of plaintiffs' counsel cured most of the evils usually associated with settlements negotiated prior to class certification.

Another challenge raised by the objecting states deserves mention. The objecting states argue that the plain-

tiffs' counsel may receive attorney's fees of $650,000 while, according to the objecting states, the plaintiff class will receive nothing of monetary value. I have not yet ruled on plaintiffs' counsel's fee petition. More importantly, I find no merit whatsoever in the objecting states' claim that the plaintiff class receives no monetary or other tangible benefits from the proposed settlement. Both the injunctive and the monetary aspects of the settlement provide tangible and genuine aid to the class, which, as I will discuss, is fair, reasonable and adequate in light of the apparent weakness of the plaintiffs' claims. One objector, remarking on the amount of the attorney fee sought, suggested that the fee be divided among the members of the class. The unreasonableness of this suggestion becomes evident when one considers that each class member, in the class of over three million people, would receive less than twenty-five (25) cents if the class split the fee award of $650,000 equally and no costs were involved in the distribution.

The objecting states question whether there was a simultaneous negotiation of the settlement and the attorney's fees. See *Prandini v. National Tea Co.*, 557 F.2d 1015, 1017 (3d Cir. 1977) (Improper to negotiate settlement and attorney's fees contemporaneously). However, counsel did not negotiate the amount of attorney's fees until after presenting the settlement agreement to me at a conference on January 28, 1986, at which time I authorized the parties to negotiate on the issue of attorney's fees. Based on all of the available information including affidavits, there has been no violation of *Prandini* in the negotiation of attorney's fees in this case. I therefore conclude that there were no improprieties in the negotiation of this settlement and that all negotiations took place at arm's length. Since I have found that the negotiations were carried out in good faith, with no collusion between the parties which could prejudice the absent class members, I may rely upon, and should be hesitant to ignore, the judgment of counsel in evaluating their case for pur-

poses of settlement. *Cotton*, 559 F.2d at 1330 (5th Cir. 1977).

The next major factor to be analyzed is the probability of plaintiffs recovering on their claims. This requires an examination not only of the probability of plaintiffs proving liability but also an examination of the risks plaintiffs face in proving damages and in maintaining this action as a class action through the trial. It is only after evaluating the strength of plaintiffs' case that I can properly determine whether the settlement provides fair and reasonable compensation to the plaintiff class. One of the purposes of a settlement is to avoid the necessity of having the court and jury resolve disputed issues of fact and law and thus my review of the strength of plaintiffs' legal claims is not intended as a resolution of the merits of plaintiffs' case. *Florida Trailer and Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960); *Grinnell*, 495 F.2d at 456 (2d Cir. 1974) ("It cannot be overemphasized that neither the trial court in approving the settlement nor this Court in reviewing that approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute.").

The primary obstacle to plaintiffs establishing antitrust liability in this case is the state action defense as set out by the Supreme Court in *Southern Motor Carriers*. Prior to the decision in *Southern Motor Carriers* the plaintiffs believed that they could avoid the state action defense because participation in the rating bureaus was permitted but not compelled by statute in the affected states. After the *Southern Motor Carriers* decision, it became clear that defendants could take advantage of the state action defense against plaintiffs' antitrust claims even though their participation in the rating bureaus was not compelled by the affected states. Under the state action defense the defendants' participation in rating bureaus would not be a basis for antitrust liability, regardless of its anti-

competitive effect, if the affected states had a clearly articulated and affirmatively expressed policy permitting such participation and if the states actively supervised the allegedly anticompetitive conduct. *Southern Motor Carriers*, 105 S. Ct. at 1727.

Plaintiffs' counsel conducted extensive discovery on the state action defense issue in the affected states from which it appeared that all of the affected states had statutes permitting collective ratemaking. My order of May 20, 1985 made clear that the existence of statutes explicitly permitting collective rate-making would satisfy the first prong of the state action defense. Even in the absence of explicit statutory authority, however, a defendant can satisfy the first prong of the test by showing that the "state's intent to establish an anticompetitive regulatory program is clear." *Southern Motor Carriers*, 105 S. Ct. at 1731. Thus, given their discovery, it was reasonable for plaintiffs' counsel to conclude that the first prong of the state action defense had been met.

Plaintiffs' counsel, therefore, quite properly focused the larger part of their discovery effort into examination of the second prong of the state action defense: active state supervision. Their evaluation of the results of their discovery efforts were informed by my decision on September 9, 1985, denying their motion to compel discovery. In that decision, I determined that the focus of the active state supervision is on the procedures set out by the state to control the anticompetitive collective rate-making rather than on the effectiveness of the individual state employees in carrying out those procedures. I based my decision on *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980), in which the Supreme Court found that the active state supervision requirement was not met where the state merely enforced the prices set by the private parties without any review of the reasonableness of the prices or monitoring of market conditions. The purpose of the second

prong is to prevent the state from authorizing private parties violating the antitrust laws without in some way regulating their conduct. *Id.* at 106.

Thus, I found that the focus of the second prong of the state action defense is on the procedures and regulations by which the state implements its regulation of the authorized collective rate-making. My decision made irrelevant plaintiffs' argument that the regulators in the affected states were failing to properly supervise the rating bureaus as required by their respective state statutes because of improper payments. Plaintiffs' counsel, supplied with their extensive discovery and my opinions on the state action defense, were able to legitimately conclude that plaintiffs' claims could not withstand defendants' imminent motion for summary judgment based on the state action defense.

The objecting states argue that the plaintiffs' counsel have taken too pessimistic a view of the plaintiffs' situation. They argue that the state action defense depends on each state's laws and thus that the strength of the defense varies from state to state. The only evidence the objecting states rely on, other than the letter from the assistant attorney generals from Wisconsin, is the fact that the FTC has not dropped its case against the defendants in all the states. However, this fact by itself is insufficient to support an inference that the plaintiffs have a viable claim in the states where the FTC has continued its action, just as the fact that the FTC has dropped its case in some of the states does not mean that the plaintiffs necessarily have no viable claims in those states. The more important factor in my evaluation of the settlement is that the objecting states (with the exception of Wisconsin), which are clearly the parties best able to provide information on their own laws and regulations regarding defendants' collective rate-making, have failed to provide any evidence by affidavit or deposition testimony to support their assertions that the state action defense would not bar plaintiffs' claims in every affected state.

The objecting states are in effect arguing that their own laws impermissibly authorize the defendants to violate the antitrust laws and yet they provide no evidence to support their assertions and there is no indication that they themselves in their respective sovereign capacities have challenged the defendants' conduct.

Wisconsin is the only objecting state even to attempt to provide evidence that defendants are not protected by the state action defense under its regulatory scheme. Wisconsin argues in a letter to the court that Wisconsin regulators have failed to properly evaluate defendants' rate submissions prior to approving them. Wisconsin claims that this failure means that the second prong of the state action defense has not been met in Wisconsin. As I have noted earlier, I do not find Wisconsin's arguments persuasive. Firstly, there is no indication that the alleged inadequate supervision by the Wisconsin regulators is attributable to inadequate regulatory procedures—the only relevant criteria under the second prong of the state action defense. Secondly, the settling parties strongly challenge Wisconsin's assertions that it failed to actively supervise the defendants' rating bureau activities. The defendants, in their reply to the letter from Wisconsin, filed on May 15, 1986, refer to the deposition of Norman Wirtz, the insurance analyst employed by the Wisconsin Insurance Commissioner, which was taken as part of the FTC proceeding. The deposition indicates that the rate proposals submitted by the rating bureau in Wisconsin were extensively reviewed prior to their approval. The defendants also note that their submitted rate proposals were accompanied by extensive written justifications. Thus, I find that the objecting states, including Wisconsin, have done nothing more than present speculative, unsupported challenges to plaintiffs' counsel's evaluation that plaintiffs' claims would stand almost no chance of succeeding in the face of the state action defense in any of the affected states. I will not upset the settlement

negotiated by the parties based on the speculative challenges of the objecting states. *Reynolds*, 584 F.2d at 286.

Although the state action defense in my view presents an almost insurmountable obstacle to plaintiffs' ability to establish defendants' liability, two other substantial obstacles also exist in this case. The first is the exemption from antitrust liability provided for the "business of insurance" by the McCarran-Ferguson Act, 15 U.S.C. § 1012, where the state regulates the business. As with the second prong of the state action defense, the relevant inquiry in determining whether the state regulates the business of insurance is whether the state has established procedures to regulate the conduct, not whether those procedures were properly carried out. See *Schwartz v. Commonwealth Land Title Insurance Co.*, 374 F. Supp. 564, 575-76 (E.D. Pa. 1974). It is my preliminary conclusion that title search and examination services, which are the main focus of plaintiffs' antitrust claims, are part of the business of insurance since they are closely related to the issuance of title insurance and have been services historically provided by title insurance companies, which would fall under the protection of the McCarran-Ferguson Act. Accord *Schwartz*, 374 F. Supp. at 572-75 (Title insurance company is protected by McCarran-Ferguson Act from antitrust liability for collective rate setting of "seller-charge" which covered cost of services incidental to transfer of title, including title search, as part of the business of insurance). But see *United States v. Title Insurance Rating Bureau of Arizona*, 517 F. Supp. 1053 (D. Ariz. 1981), *aff'd*, 700 F.2d 1247 (9th Cir. 1983), *cert. denied*, 467 U.S. 1240 (1984) (escrow services held not to be part of the business of insurance). Although no discovery was conducted specifically on the McCarran-Ferguson Act issue, it would seem that the discovery on the state action defense which showed the involvement of the affected states in the collective rate-making process indicates that the McCarran-Ferguson Act also poses a very significant if not insurmountable ob-

stacle to the establishment of liability against the defendants.

The final obstacle faced by plaintiffs, in even establishing a cause of action, is the filed tariff doctrine set out by the Supreme Court in *Keogh v. Chicago v. Northwestern Ry.*, 260 U.S. 156 (1922).[7] Under this doctrine, the plaintiffs may have been unable to recover damages based on the allegedly anticompetitive rates charged by the defendants because those rates were approved by the state regulatory agency. *City of Newark v. Delmarva Power & Light Co.*, 467 F. Supp. 763, 769 (D. Del. 1979). None of the objecting parties have made any mention of the risks posed by the McCarran-Ferguson Act or the filed tariff doctrine in their challenges to the settlement.

The objecting parties also fail to address the difficulties plaintiffs would face in proving damages. There is no evidence that the rates arrived at by the rating bureaus are higher than those that would have been set had the collective rate-making not occurred. Furthermore, plaintiffs would have faced difficulites in maintaining a class action throughout the proceedings. Although for purposes of settlement I have found that certification of a class is appropriate, new problems would arise if the factual issues in this case had to be fully litigated. The decision as to liability and damages in each affected state might well have required the formation of subclasses or separate classes. The objecting states themselves suggest that damages and possibly impact may have to be proved for each class member. Joint Memorandum of Objecting States, p.13. Thus I conclude that the difficulties set out above would make it extremely unlikely that the plaintiffs would have been awarded any relief, monetary or injunctive, on their claims had this case not settled.

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[7] The *Keogh* doctrine was recently reaffirmed by the Supreme Court in *Square D Company and Big Building Supply Corp. v. Niagara Frontier Tariff Bureau, Inc.*, 54 U.S.L.W. 4520 (May 27, 1986).

In addition to the substantial legal difficulties outlined above, plaintiffs also faced the practical difficulties of pursuing this complex litigation. This action was settled prior to defendants' filing their anticipated motion for summary judgment based on the state action defense. The expense and effort required to respond to the anticipated motion would have been very substantial. Furthermore, defendants, having invested equivalent time and expense in preparing the motion, may well have been less likely to agree to a settlement once the motion had been filed. Even in the unlikely event that plaintiffs were able to avoid summary judgment on the state action defense, further motions based on the other defenses would likely follow. These motions and the responses to them would require additional discovery and delay. The actual trial or trials of this case or these cases would also be complex and lengthy involving difficult issues of liability and damages. Thus, even if these cases were to proceed, the delay and expense involved in obtaining any relief for the class would be enormous.

The fairness and adequacy of the settlement can only be properly evaluated by taking into consideration the overwhelming risks which plaintiffs faced in achieving any benefits through litigation. *Bogosian v. Gulf Oil Corp.*, 1985-1 Trade Cas. (CCH) ¶ 65,510, p. 65,549 (1985). The settlement provides two distinct benefits to the plaintiff class. The first is a $5,000.00 enhancement of plaintiffs' title insurance policies. Agreement of Settlement, ¶ 7(B). The second is an injunction against defendants' participation in rating bureaus until December 31, 1987. Agreement of Settlement, ¶ 7(A). The objecting parties argue that these benefits are of no value to the plaintiffs and thus are inadequate. I find, however, that both the monetary and the injunctive provisions of the settlement are of substantial value to the plaintiffs, even though they may not provide any practical monetary relief to some members of the class. Given the risks posed by continued litigation, the value of the settlement is fair

and adequate compensation for plaintiffs' waiver of their claims.

The defendants have agreed to increase the amount of coverage on all title insurance policies issued by them to class members in the affected states. The defendants have also agreed to provide without charge the last $5,000 of coverage on new policies issued within a year to class members who either bought title insurance for the benefit of others or who bought title insurance from a nondefendant company during the reelvant period, from January 1, 1981 to December 31, 1985. The benefits provided in this section of the settlement are applied automatically to the plaintiffs' insurance policies and the defendants have agreed to make good faith efforts to inform class members of the benefits of the settlement when class members are entitled to those benefits (*i.e.*, when an insured class member makes a claim under his policy, or when an insured class member is entitled to a re-issue rate discount on a new policy and the charge for the new policy is affected by the enhancement provisions; or when a non-insured class member applies to purchase a new policy to which the settlement applies). Agreement of Settlement, ¶ 7(B)(3). Any violation of this provision, which will be contained in the injunction issued pursuant to the settlement, would be enforceable in a contempt proceeding.

The additional $5,000 of title insurance coverage is a benefit to all the class members, regardless of whether or not they make claims on their title insurance policies. The additional coverage represents an additional shifting of the risk of a failure of title from plaintiffs to defendants. As with any insurance, this shifting of risk by itself represents a benefit to the plaintiffs. Although the title search which accompanies the issuance of a title insurance policy is meant to minimize and/or eliminate the risk to the defendants that the title will later prove in some way defective, the defendants have presented evi-

dence that title insurance companies nationwide have paid out, on the average, close to eight percent of their gross operating revenue on losses in the period between 1981 and 1984. Affidavit of Robert L. Stratton, ¶ 19.[8] Thus, title insurance still represents the shifting of an appreciable risk to the defendants and any additional shifting of that risk is a valuable benefit to the plaintiff class whether or not a loss occurs or a claim is made. Defendants' have asserted that it would cost a class member approximately twenty dollars to purchase the additional coverage provided by the settlement. Affidavit of Robert L. Stratton, ¶ 11. The additional insurance is, of course, of greater value to those class members whose property has increased in value and who suffer a loss due to a defect in title. The fact that some class members receive this added benefit does not alter the fact that all the class members receive some benefit regardless of whether they ever file a claim.

The additional insurance also provides benefits to the class members because it entitles them to higher reissue and refinance rate credits on policies they may buy in the future. Affidavit of Robert L. Stratton ¶ 12. This benefit arises because these credits on new policies are usually based on the amount of coverage of the old policy. The value of this benefit is not dependent on whether a class member ever files a claim on his title insurance policy. Thus, I conclude that the policy enhancement provision provides a distinct benefit to the plaintiff class.

Some of the objecting parties including the objecting states argue that the benefits conferred by the settlement do not adequately reflect the fact that some of the plaintiffs were purchasers of large title policies while others were purchasers of small policies. However, one of the

[8] The objecting states argue that the pay out rate is below 5%. However, their figures are based only on title insurance companies in Ohio, rather than on the nationwide sample on which defendants' figures are based. I place more weight on defendants evidence because it is based on a larger sample.

legitimate purposes of a settlement is to avoid the necessity of litigating the claims of the individual class members. Further, it is not at all clear that any alleged overpayments for title services would be directly proportional to the amount of coverage of the title insurance policy. Apparently purchasers of large policies are often able to obtain discounts from the defendants. Defendants' Memorandum at p.15. There is no evidence that the challenged services are priced directly on the total amount of the title insurance coverage. The practical difficulties involved in establishing a proportional enhancement of plaintiffs' policies would substantially increase the cost of the settlement to the defendants and it was reasonable for the plaintiffs' counsel to accept a uniform enhancement as a compromise in the settlement negotiations.

Some of the individual objectors argue that because of their circumstances, they will not benefit from the enhancement provision. Even if I accept the truth of their assertions, they still benefit from the injunctive relief. Also, I would not disapprove the settlement based on a small number of class members who may not benefit from the enhancement provision when to do so would deny all the benefits of the settlement to the entire class. There is no evidence that there are a significant number of class members who will not benefit from the enhancement provision.

The settlement also provides for benefits to class members who either purchased title insurance for the benefit of others or who purchased title insurance from a non-defendant company. These class members receive the last $5,000 of coverage free on any new policy which they purchase from a defendant within a one-year period running from the final approval of the settlement. The free coverage will reduce the cost of the premium by approximately $20.00. Affidavit of Robert L. Stratton, ¶ 17. The free coverage will also be available for class members who are paying for a new policy when refinancing a

home. Given the recent drop in interest rates, it is likely that an increased number of class members will benefit from this provision. *Id.* at ¶ 18. Many of the objecting parties argue that this provision is inadequate because it does not allow the plaintiffs to aggregate the free policy coverage they would receive for each title insurance policy purchased during the relevant period and because the benefit provided by this provision only extends for one year. These objections are without merit because, while the alternatives they suggest would increase the benefit to the class members, the adequacy of the settlement is measured not by the absolute value of the settiement, but by the relation of that value to the probability of recovery on the merits. Given the weakness of plaintiffs' claims, the fact that plaintiffs' counsel had to compromise on a settlement which does not provide all the relief suggested by the objectors does not mean that the settlement is inadequate. I note that with the exception of the state objectors, none of the objecting parties even mention the difficulties plaintiffs would have succeeding on the merits of their claims. The majority of the individual objectors to both the enhancement provision and the new policy provision do no more than complain that they would prefer to receive money rather than increased policy coverage. However, with a class that is estimated to number over three million, even the smallest of direct monetary awards would result in the defendants paying out tens of millions of dollars. It is not surprising then that the defendants refused to agree to any direct monetary settlement when faced with plaintiffs' extremely weak claims. It is also worth noting that out of a class of over three million, only twenty objections were filed other than those filed by the states.[9]

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[9] Counsel for plaintiffs and defendants received hundreds of inquiries as the result of the published notice and sent out a copy of the settlement agreement to each inquiring party. See Perelman Affidavit, Exhibit A (list of parties making inquiries to plaintiffs' counsel), and Defendants' Memorandum, Exhibit G (list of parties making inquiries to defendants' counsel). Allowing for overlap in the lists, close to 600 people received copies of the settlement agreement from counsel for the settling parties. Even if I were to make the unlikely assumption that only those people who made inquiries had received notice of the proposed settlement, the number of objectors still comes to less than 5% of the inquiring class members. See *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 803 (3d Cir. 1973), *cert. denied*, 419 U.S. 900 (1974), *reh'g denied*, 420 U.S. 913 (1975). (Class action settlement approved even though 20% of the class objected). Thus, I find that the response of the class to the settlement is a factor favoring approval of the settlement.

In addition to the monetary benefits provided by the settlement, the plaintiff class also benefits from the injunctive relief specified in the settlement. The settlement enjoins the defendants from participating in any way in rating bureaus in Arizona, Connecticut, Idaho, Montana, Ohio and Wisconsin until December 31, 1987. In the other affected states—Louisiana, New Jersey, New Mexico, New York, Oregon, Pennsylvania and Wyoming—the defendants are prohibited from participating in rating bureaus unless the state has a clearly articulated and affirmatively expressed policy permitting collective rate-making and actively supervises the process. Agreement of Settlement, ¶ 7(A). Plaintiffs' claims are based on the allegedly anti-competitive effects of collective rate-making as to discrete title insurance services, and thus the injunctive relief limiting participation in rating bureaus, as to all title insurance services, provides extensive relief responsive to plaintiffs' claims. The defendants, in the states where they are barred from collective rate-making, are foregoing their right to participate in collective rate-making even though it otherwise would satisfy the requirements of *Southern Motor Carriers*. In the other states, the defendants are foregoing their reliance on the other defenses to liability, in particualr the McCarran-Ferguson Act defense. Plaintiffs are receiving a benefit in these states that they could not have received at trial, even if ultimately successful, since defendants are foregoing their right collectively to set prices for title insurance premiums as well as settle-

ment services. Title insurance premiums are clearly covered by the McCarran-Ferguson Act. Thus, the injunctive provisions of the settlement provide a substantial benefit to the plaintiff class, beyond that which is sought in the complaint or could even arguably be obtained upon totally successful litigation.

The objectors argue that the injunction is inadequate since it only applies until December 31, 1987. However, this challenge, like that to the monetary aspects of the settlement, is without merit because it overlooks the fact that plaintiffs would not be likely to receive any injunctive relief were this case to proceed. I also reject the argument that the injunction is valueless because the defendants have already withdrawn from rating bureaus in the affected states. Absent the settlement, there is nothing to prevent the defendants from rejoining rating bureaus in any of the affected states, with the exception of New Mexico where the statutory rule permitting collective ratemaking has been eliminated.

The objecting states also argue that only a cash recovery is an appropriate remedy for a price-fixing violation. However, given the weakness of plaintiffs' claims; the defendants assert, and it seems reasonable to believe, that they would never agree to a cash settlement. Furthermore, non-cash recovery settlements have been approved in antitrust class actions. See *In re Cuisinart Food Processor Antitrust Litigation,* 1983-2 Trade Cas. (CCH) ¶ 65,680 at p.69,474 (D. Conn. 1983), and cases cited therein. Thus, I conclude that the injunctive and monetary provisions of the settlement provide substantial benefits to the plaintiff class which are fair and adequate in view of the plaintiffs' chances of succeeding on the merits of their claims.

The adequacy of the settlement is not adversely affected by the fact that the monetary provisions are subject to approval by the regulatory agencies in the affected states. The defendants have agreed to use their best efforts to

obtain approval of the settlement. Agreement of Settlement, ¶ 2. To date, the defendants have submitted letters from eleven of the thirteen affected states establishing that those states agree with or at least do not oppose the settlement. Defendants' Memorandum, Exhibits B-F; Defendants' Supplemental Memorandum, Exhibits A-F. Ohio and Wisconsin, the two remaining states, have yet to state a position with regard to approval of the settlement. However, even if these states were not to approve the monetary portions of the settlement, the class members in those states would still have the substantial benefit of the injunctive provisions. Therefore, the objecting states' concern over regulatory approval does not alter the conclusion that the settlement provides fair and adequate benefits to the class.

The objecting states also challenge the settlement as having an illegal anticompetitive effect. This argument is based on the fact that class members who purchased title insurance for the benefit of others or who purchased from nondefendant companies will have to purchase any new policies from the defendants in order to obtain the monetary benefits of the settlement by way of insurance policy enhancement. The objecting states have provided no evidence in support of their assertions of anticompetitive effect nor have any of the nondefendant title insurance companies, who would be the alleged victims of any anticompetitive effect, presented any objections to the settlement. Also none of the state insurance departments, who are responsible for approving rates, have raised any challenge to the settlements as to purported anticompetitive effect.

I find that the settlement in this case is distinguishable from that in *New York v. Dairylea Cooperative,* 547 F. Supp. 306 (S.D.N.Y. 1982), *appeal dismissed,* 698 F.2d 567 (2d Cir. 1983), where the court disapproved a settlement in an antitrust case because of its anticompetitive effect. The settlement in that case provided for a coupon

plan under which the defendants were to distribute "cents-off" coupons for their product over a five-year period. The court was concerned that the coupon plan was little more than a marketing program for the defendants which they could manipulate by controlling the timing and location of the coupons. *Id.* at 308. In this case, the defendants have no discretion on when or where to provide the benefits specified in the settlement. Also the court in *Dairylea* was concerned that the settlement made no attempt to specifically reimburse those allegedly overcharged in the past. *Id.* In this case the settlement benefits are targeted directly at those who have bought title insurance in the past. Thus, I find that the concerns raised by the court in *Dairylea* are not present in this case. Furthermore, settlements involving redeemable coupons have been approved by other courts in the past. See *In re Cuisinart*, ¶ 65,680 at p.69,474, and cases cited therein.

My conclusion therefore is that, based on the relevant factors, the settlement negotiated by the parties in this case is reasonable, fair and adequate. The settlement was negotiated for the plaintiff class by competent counsel who observed their duty to protect the interests of the entire class and who had the benefit of extensive discovery when evaluating the case. The settlement they worked out provides substantial benefits to the entire plaintiff class when considered in light of the almost insurmountable difficulties that the plaintiffs would have faced in obtaining any relief had they continued with this litigation. The complexity and expense of continued litigation only add to the legal difficulties plaintiffs faced on the merits of their claims. I find that the objections to the settlement are without merit and should not and do not prevent approval of the settlement. The objecting parties were given ample opportunity to present and argue their objections. Therefore, pursuant to Federal Rule of Civil Procedure 23(e), I will approve the settlement of this antitrust class action suit.

FINAL ORDER AND JUDGMENT

NOW this 10th day of June, 1986, the Court, having held a hearing on April 10, 1986, and having considered the Settlement Agreement dated January 8, 1986, the affidavits and memoranda in support of the settlement, and the objections to the settlement, it is hereby ordered, adjudged and decreed:

1. The notice directed to the members of the class pursuant to the Court's Order of January 29, 1986, comports with the requirements of Rule 23(e), Federal Rules of Civil Procedure, and brought the proposed settlement of sufficient representative class members who were in a position to bring to the Court's attention any inadequacies in the proposed settlement, any inadequacies in representation, or conflicts of interest among class members.

2. For purposes of this Final Order and Judgment, the term "Affected States" shall mean the states of Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Wisconsin and Wyoming.

3. Pursuant to Rules 23(a) and 23(b)(1) and (b)(2) of the Federal Rules of Civil Procedure, the following class is confirmed in this litigation:

> All Purchasers and insureds who purchased or received title insurance, including search and examination and/or settlement services, from any title insurance underwriter (whether or not a defendant herein) or any agent of such underwriter with respect to real estate located in any of the thirteen Affected States during the period from January 1, 1981 to December 31, 1985 inclusive.

The judgment herein includes all members of the class described above.

4. The representative plaintiffs have fairly and adequately protected the interests of the above-described class.

5. Each of the objections filed with the court has been considered, is found to be without merit, and is hereby overruled.

6. The terms of the Settlement Agreement dated January 8, 1986 between plaintiffs and the class and each of the defendants are fair, reasonable and adequate to the class, and the Agreement is approved pursuant to Rule 23(e), Federal Rules of Civil Procedure.

7. In accordance with the terms of the Settlement Agreement, as approved by the court, it is hereby ORDERED:

A. Each defendant is enjoined until December 31, 1987 from joining or participating in any way in any rating bureau in the Affected States; provided that this injunction shall apply in Arizona, Connecticut, Idaho, Montana, Ohio and Wisconsin regardless of whether any such state has clearly articulated and affirmatively expressed a policy permitting collective rate filing through rating bureaus subject to active supervision by the state; and provided further that this injunction shall not prohibit defendants from joining or participating in rating bureaus in Louisiana, New Jersey, New Mexico, New York, Oregon, Pennsylvania or Wyoming as long as such state has clearly articulated and affirmatively expressed a policy permitting collective rate filing through rating bureaus subject to active supervision by the state;

B. Each defendant is ordered to increase by $5,000.00, without additional charge, the amount of insurance coverage for each title insurance policy for property located in any of the Affected States that has been issued by that defendant or its agent to an insured member of the Class during the period January 1, 1981 through December 31, 1985, inclusive;

C. With respect to transactions in which members of the Class did not become insureds of any of the defendants in the class period (either because they purchased

title insurance for the benefit of others, or because they purchased title insurance from a non-defendant underwriter or any agent of a non-defendant underwriter), each defendant is ordered to provide the last $5,000.00 of insurance coverage without charge in connection with any new title insurance policy purchased from any of the defendants by such a class member for property located in any of the Affected States within the one year period following the date that this order becomes a Final Order. As used herein, the term Final Order refers to the expiration of the time to appeal from this Final Order and Judgment without the filing of a notice of appeal or other request for appellate review or if an appeal is taken, the final affirmance of this Final Order and Judgment on appeal (or other appellate review) or the final dismissal of any appeal from this Final Order and Judgment;

D. Each defendant is ordered to make good faith efforts to inform members of the Class of their entitlement to the provisions described in Paragraphs 7B and 7C above, at such times as individual class members may be entitled to benefit from such provisions, (i.e., when an insured class member makes a material claim under his policy; or when an insured class member is entitled to a re-issue rate on a new policy and the charge for the new policy is affected by the provisions of Paragraph 7B above; or when a non-insured class member applies to purchase a new policy to which Paragraph 7C applies.);

E. The enhancement to be provided pursuant to Paragraph 7B above will apply regardless whether the class member has knowledge of any pending claim at the time the enhancement becomes effective;

F. The enhancement to be provided pursuant to Paragraph 7B above will apply retroactively to any claim by a class member which results or has resulted in a settlement or judgment causing a payment by the defendant of pre-enhancement policy limits and necessitating a contribution from the insured in which case the insured will be entitled to an additional payment in the amount of his

required contribution to the extent of the enhancement. However, with respect to claims finally resolved and files closed prior to January 8, 1986, defendants shall have no affirmative obligation to reopen such files to locate potential claimants;

G. The enhancement to be provided pursuant to Paragraph 7B above, will be included in the base coverage from which any inflation index or other formula for increased coverage is calculated, and any increased coverage under such an inflation or other rider will be calculated as though the enhancement had been in effect ab initio;

H. Any member of the Class wishing to avail himself of the provisions of Paragraph 7C may be required to establish eligibility for such a benefit by a sworn statement under penalty of perjury and by such other proof or eligibility as the defendant issuing the policy may reasonably deem necessary.

I. A class member shall be eligible for the benefit provided for in Paragraph 7C once for each policy of title insurance he purchased during the class period; but such benefits may not be aggregated. For example, if a class member purchased two policies during the class period and is otherwise entitled to take advantage of the provisions of Paragraph 7C, he is entitled ot receive the last $5,000 of coverage without charge on each of two new policies purchased from any defendant; but he is not entitled to receive the last $10,000 of coverage without charge on the purchase of one new policy from a defendant.

8. Subject to the provisions of Paragraph 9 of this Final Order and Judgment, all claims that plaintiffs and members of the class may have as against defendants, their respective parents, subsidiaries, affiliates, agents, officers, directors and employees, arising under the laws of the United States or of any state or other jurisdiction

that are based on, relate to or arise out of any allegations that any of them agreed or conspired to fix, raise, maintain, stabilize, or otherwise affect the prices of title insurance, including title search and examination and/or settlement services, are dismissed with prejudice; and in addition, each of the complaints filed herein is dismissed with prejudice.

9. Any and all claims by any member of the class against any title insurance underwriter other than the defendants and their respective parents, subsidiaries, affiliates, agents, officers, directors and employees, are not dismissed and shall survive the settlement and this Final Order and Judgment. Neither this Final Order and Judgment nor the fact of this settlement with defendants shall be construed to affect, in any manner whatsoever, any liability (whether individual, joint or several) of any title insurance underwriter or any other person or entity other than the defendants and their respective parents, subsidiaries, affiliates, agents, officers, directors and employees, any putative common law rule or practice, or state or local statute, to the contrary notwithstanding.

10. Without affecting the finality of this judgment in any way, this Court retains jurisdiction over the parties and action for the purposes of construing, enforcing, or effectuating any orders entered pursuant to the Settlement Agreement dated January 8, 1986, or this Final Order and Judgment; and it is further

ORDERED that in accordance with the Court's findings herein, the clerk of the Court is directed to enter final judgment pursuant to Fed.R.Civ.P. 58.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1450

In Re: REAL ESTATE TITLE AND SETTLEMENT SERVICES ANTITRUST LITIGATION

STATE OF ARIZONA, APPELLANT

[815 F.2d 695]

Appeal from the United States District Court
For the Eastern District of Pennsylvania
(Civil Action No. MDL-633)
District Judge: Honorable Donald W. VanArtsdalen

Argued February 11, 1987
Before: Higginbotham and Stapleton, Circuit Judges
and Rodriguez, District Judge

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is ORDERED AND ADJUDGED that the district court's Final Order and Judgment of June 10, 1986 be and is hereby affirmed.

Costs taxed against appellant.

Dated: March 3, 1987

By the Court,

/s/ Walter K. Stapleton,
Circuit Judge

Attest:
/s/ Sally Mrvos, Clerk

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

ARIZONA,
Petitioner

v.

CHICAGO TITLE INSURANCE COMPANY, ET AL.,
Respondents

[485 U.S. 909]

No. 86-1963

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit
[decision below reported at 815 F.2d 695]

ORDER

The petition for writ of certiorari is denied. Justice White would grant certiorari. Justice Stevens took no part in the consideration or decision of this petition.

February 29, 1988

Attest:

/s/ Joseph F. Spaniol, Jr., Clerk

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class Actions

(a) PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate

over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The

judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

SUBSIDIARIES (except Wholly-owned Subsidiaries) OF STEWART TITLE GUARANTY COMPANY

American Surveying of New England
Associated Abstract Agency, Inc.
Baca Landata, Inc.
Backman-Stewart Title Services, Ltd.
Blaine County Title Associates
Citizens Title & Trust
Fleetwood Management Corporation
Island Title Corporation
Island Title Exchange, Inc.
Landata, Inc. of Illinois
Landata, Inc. of the Midwest
Nacogdoches Abstract & Title Company
O'Rourke Title Company
Peoples Title Agency, Inc.
Potomac Title & Escrow
SIT Investment Corporation
Stewart Escrow & Title Services of Lawton
Stewart-Fidelity Title Company
Stewart Holding Company
Stewart-Princeton Abstract Company
Stewart River City Title, Inc.
Stewart Tax Service
Stewart Title (Glendale)
Stewart Title Agency of Bergen County
Stewart Title Agency of Ohio, Inc.
Stewart Title and Escrow, Inc.
Stewart Title & Settlement Services, Inc.
Stewart Title & Trust of Phoenix, Inc.
Stewart Title & Trust of Tucson
Stewart Title Company of Contra Costa
Stewart Title Company of Minnesota
Stewart Title Delaware, Inc.
Stewart Title of Aspen, Inc.
Stewart Title of Boulder County
Stewart Title of Central Nevada

Stewart Title of Clearwater, Inc.
Stewart Title of Eagle County
Stewart Title of Fort Myers, Inc.
Stewart Title of Fresno County
Stewart Title of Glenwood Springs, Inc.
Stewart Title of Hampton Roads, Inc.
Stewart Title of Larimer County
Stewart Title of Lubbock, Inc.
Stewart Title of Modesto
Stewart Title of Monterey County
Stewart Title of Montgomery County, Inc.
Stewart Title of Nevada
Stewart Title of Northern Nevada
Stewart Title of Oregon, Inc.
Stewart Title of Pennsylvania, Inc.
Stewart Title of Rhode Island, Inc.
Stewart Title of Rockport, Inc.
Stewart Title of San Patricio County, Inc.
Stewart Title of Santa Barbara (A division of Stewart Title of Fresno County)
Stewart Title of Sarasota
Stewart Title of Tampa
Stewart Title Orange County
Texarkana Title & Abstract Co., Inc.
Unique Exchange, Inc.

(2)

Supreme Court, U.S.
FILED
JUL 19 1993
OFFICE OF THE CLERK

No. 92-1988

In The

Supreme Court of the United States

October Term, 1993

TICOR TITLE INSURANCE COMPANY, *et al.*,

Petitioners,

v.

WALTER THOMAS BROWN AND JEFFREY L. DZIEWIT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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STATUTES

15 U.S.C. § 22 9

STATEMENT OF THE CASE

Petitioners seek review of the Ninth Circuit Court of Appeals' decision reversing a summary judgment that dismissed this federal treble damage antitrust class action lawsuit brought on behalf of a class of purchasers from the states of Arizona and Wisconsin. The lawsuit charges the Petitioners, comprising six of the nation's largest title insurance companies, with horizontal price fixing of the fees for title search and examination services. The alleged Section 1 Sherman Act violations arise from the same conduct reviewed by this Court last term in *Federal Trade Comm'n. v. Ticor Title Ins. Co.*, 112 S.Ct. 2169 (1992). Review should be denied because the Ninth Circuit's decision is neither inconsistent with any decision of this Court nor in conflict with the decision of any other court of appeals and no novel or substantial issue of law is involved.

The Proceedings

In litigation that commenced in 1980, the defendant title insurers were sued by the United States, the State of Arizona and private class representatives in state and federal courts in Arizona for price fixing of escrow services (distinct from search and examination services). No material issues of fact were presented and defendants sought summary judgment based on immunity from antitrust liability under the doctrine of state action articulated in *Parker v. Brown*, 317 U.S 341 (1943) and the filed tariff doctrine articulated in *Keogh v. Chicago and N.W. Ry. Co.*, 260 U.S. 156 (1922).

Both defenses were rejected by the district court. *United States v. Title Ins. Rating Bureau of Ariz.*, 517 F.Supp. 1053 (D. Ariz. 1981), *aff'd*, 700 F.2d 1247 (9th Cir. 1983), *cert. denied*, 467 U.S. 1240 (1984) (*"TIRBA"*); *In re Ariz. Escrow Fee Antitrust Litig.*, 1981-2 Trade Cases ¶ 64,429. Total settlements of $4.82 million were obtained. *In re Ariz. Escrow Fee Antitrust Litig.*, Civ. No. 80-840A PHX CAM (D. Ari. Sept. 22, 1982).[1]

In 1985 the Federal Trade Commission began an action against the same defendants for price fixing fees for real estate title examination and search services, as distinct from escrow fees. *In re Ticor Title Ins. Co.*, Docket No. 9190, FTC Initial Decision of Administrative Law Judge (December 22, 1986). Twelve private class actions, filed in the wake of the FTC's complaint, were consolidated in the Eastern District of Pennsylvania as MDL 633. *In re Real Estate Title and Settlement Serv. Antitrust Litig.*, 1986-1 Trade Cases (CCH) ¶ 67,149 (E.D. Pa. 1986). The consolidated cases sought, *inter alia*, damages on behalf of consumers who purchased title search and examination and escrow services at fixed prices from the title insurers in those thirteen states. *Id.* None of the private class actions were filed by residents of Arizona or Wisconsin or by anyone damaged by the title insurers' alleged price fixing in Arizona or Wisconsin. *Id.* As in the earlier

[1] The ruling on state action immunity was appealed to the Ninth Circuit, which affirmed the district court's holding that Arizona's title insurance legislation did not reflect a clearly articulated or affirmatively expressed state policy to supplant competition. *TIRBA*, 700 F.2d at 1253.

escrow fee litigation in Arizona, the MDL 633 defendants asserted state action immunity under *Parker*. Shortly after consolidation of the private cases, this Court handed down its decision in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985). *Id.* at 62,922.

The *Southern Motor Carriers* decision was construed by class counsel as being adverse to all class members' claims. *Id.* at 62,923. Class counsel failed to distinguish between the various state regulatory schemes. *Id.* at 62,932. In early 1986, the MDL 633 class representatives entered into a settlement that provided the class members with no damages and no meaningful equitable relief but did provide for attorneys' fees in the amount of $715,000 to class counsel. *Id.* at 62,924-925, 926 n. 5. Petitioners' counsel have admitted that the settlement obtained by the lawyers for the class only benefitted class counsel. Petitioners' App. 1a-2a.

The class representatives' attorneys in the MDL 633 litigation dropped the damage claims seeking tens of millions of dollars and, instead, agreed to a settlement that provided only equitable relief. The class representatives then sought certification under Rules 23(b)(1) and (b)(2), Fed. R. Civ. P. *Id.* at 62,928. Dropping the damage claims at time of settlement was intended to avoid certification under Rule 23(b)(3) and thereby eliminate the right of objecting class members to opt out. *Id.* at 62,929. The only notice provided to the class was by publication. *See* Petitioners' App. at 41a n. 4.

Attorneys General from Montana, New Jersey, Ohio, Pennsylvania and Wisconsin objected to the settlement because it provided no meaningful relief to the class. *Id.*

at 62,926. Moreover, the Attorneys General pointed out that the effect of the *Southern Motor Carriers* decision varied from state to state. *Id.* at 62,927. (For example, in states where the title insurers' price fixing was not actively supervised by the state, *Southern Motor Carriers* had no impact. *Id.* at 62,932). They also objected because the settlement provided only the class lawyers with any real benefits. *Id.* at 62,931. The Arizona Attorney General attempted to opt out on behalf of the State of Arizona and Arizona consumers, claiming inadequate representation. *Id.* at 62,929.

The MDL 633 court held that none of the class members could opt out because the class had been certified under Rule 23(b)(1) and (b)(2), rather than Rule 23(b)(3). *Id.* It overruled all objections and approved the settlement. It acknowledged that the claims involved tens of millions of dollars of overcharges by the defendants (*Id.* at 62,935), but nevertheless entered a judgment purporting to extinguish these damage claims for all class members, including the absent Arizona and Wisconsin class members. *Id.*

Arizona appealed the refusal to allow absent class members to opt out. The Third Circuit affirmed without opinion. *In re Real Estate Title and Settlement Serv. Antitrust Litig.*, 815 F.2d 695 (3d Cir. 1988), *cert. denied*, 485 U.S. 909 (1988). In a subsequent decision by the Third Circuit in 1989 (vacating an injunction by the MDL 633 court against the Arizona Attorney General who was then seeking damages for the Arizona class members in the Arizona state courts), the Third Circuit observed that the absent Arizona class members in MDL 633 had not been provided with the minimum procedural protections

required by this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and explained its earlier affirmance without opinion of the MDL 633 judgment as reflecting the right of absent class members to obtain collateral review. *In re Real Estate Title and Settlement Serv. Antitrust Litig.*, 869 F.2d 760, 762-763, 764 n. 1 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989).

Six months after the Third Circuit's 1989 decision in *In re Real Estate Title and Settlement Serv. Antitrust Litig.*, the FTC entered a final order finding that there had been no active state regulation of search and examination rates in either Arizona or Wisconsin and that the defendant title insurers were guilty of price fixing in those states. *In re Ticor Title Ins. Co.*, Docket No. 9190, p. 13-20, FTC Final Order (September 19, 1989). This treble damage suit was filed on the heels of the FTC's Final Order. Following the Third Circuit's reversal of the FTC on grounds of state action immunity, *Ticor Title Ins. Co. v. Federal Trade Comm'n.*, 922 F.2d 1122 (3d Cir. 1991), this Court granted certiorari, reversed the judgment of the Third Circuit, and remanded the case for further proceedings consistent with the Court's conclusion that the Petitioners were not entitled to state action immunity in Wisconsin and might not be entitled to such immunity in Arizona. *Federal Trade Comm'n. v. Ticor Title Ins. Co.*, 112 S.Ct. 2167, 2176 (1992).

REASONS FOR DENYING THE WRIT

The questions on which review is sought involve no conflict with any decision of this Court or of any other

Court of Appeals. The decision below properly applies well-established constitutional principles of minimal due process announced by this Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and *Philips Petroleum Co. v. Shutts*, 472 U.S. 798 (1985). In this case, substantial damage claims were foreclosed without notice to or opportunity for absent plaintiffs to remove themselves from the class litigation. With respect to the other two purported errors, the decision below correctly reaffirms earlier decisions in prior litigation against the same defendants over eleven years ago.

I. NO NEW CONSTITUTIONAL QUESTION IS PRESENTED BY THE RECORD AND THE DECISION BELOW IS CLEARLY IN ACCORD WITH THE DECISIONS OF THIS COURT.

Petitioners ask this Court to review whether an absent plaintiff is bound under the doctrine of *res judicata* by the settlement of a federal class action lawsuit in which substantial damage claims were foreclosed, where he received no notice of the lawsuit, had no opportunity to remove himself from the litigation, did not know who the lawyers were, and was not told about the settlement.

That issue was laid to rest in *Shutts* and review is therefore not warranted. *Shutts* holds that absent plaintiffs must receive proper notice:

> If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, [footnote omitted] it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel.

472 U.S. at 811-812. To satisfy due process, the notice to absent plaintiffs must not only contain the needed informaiton; it must be sent by means reasonably calculated to reach the intended addressee. *Mullane*, 339 U.S. at 314-315. Absent special circumstances (not present here), notice by publication is inadequate. *Id.* at 319-320. As stated in *Shutts*, only:

> a fully descriptive notice . . . sent first-class mail to each class member, with an explanation of the right to "opt out," satisfies due process.

472 U.S. at 812.

Defendants failed to provide the notice required by *Mullane* and *Shutts*. No reasons have been advanced to explain this want of notice. There having been no adequate notice, the Court of Appeals correctly held that the absent plaintiffs were not accorded minimal due process.

The requirement of notice to the absent plaintiff gives him the right to take a meaningful part in the case, including the right to remove himself from it. In *Shutts*, this Court held:

> Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.

Id.

Petitioners' contention that the *Shutts* requirement of according absent plaintiffs the right to opt out does not

apply in *federal* class actions is without merit. *Shutts* itself makes clear that the same constitutional principles apply in a federal forum. *Id.* at 812-815. Thus, in rejecting the Petitioners' contention there that an opt-in procedure was required by the due process clause and concluding that an opt-out procedure was constitutionally permissible, this Court pointed out that an opt-in requirement "would require the invalidation of scores of state statutes *and of the class action provision of the Federal Rules of Civil Procedure. . . .* " *Id.* at 813 (emphasis added). Clearly this Court intended that the same due process considerations would apply to federal as to state actions.[2]

Petitioners' extended discussion of nationwide federal jurisdiction in antitrust cases is inexplicable. The court in *Shutts* did not distinguish between absent *resident* class members and absent *non-resident* class members; the distinction was between absent *plaintiffs* and absent *defendants*. *Shutts* dealt with the question of notice to all absent class members, calling for no different treatment of residents than non-residents. As explained in *Shutts*, while the contacts a defendant has with the forum state impact upon the extent to which jurisdiction may be exercised over him, such contacts are irrelevant regarding plaintiffs. Moreover, even defendants *with* minimum contacts are entitled to notice. If jurisdiction over absent Plaintiffs required *minimum* contacts (as the petitioner in

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[2] The due process guarantees of the Fourteenth and Fifth Amendments are essentially the same. *See In re Real Estate Title and Settlement Serv. Antitrust Litig.*, 869 F.2d 760, 766 n. 6 (3d Cir. 1989).

Shutts argues unsuccessfully), that would be in addition to notice, not in place of notice.[3]

While this Court confined its ruling in *Shutts* to cases in which the relief sought was wholly or predominantly damages, MDL 633 was such a case. Both the Third Circuit (on direct review) and the Ninth Circuit (on collateral review) concluded that MDL 633 "involved the *foreclosure of substantial damage claims.*" *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *pet. for cert. filed* (June 15, 1993); Petitioners' App. at 12a (emphasis in original); *In re Real Estate Title and Settlement Serv. Antitrust Litig.*, 869 F.2d 760, 768 (3d Cir. 1989).[4] It follows that the absent

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[3] *Shutts* also cannot be distinguished by the fact that this action proceeds under a federal claim rather than under state law in diversity. The exercise of personal jurisdiction in a federal question case depends on whether a rule or statute potentially confers jurisdiction. *See Go-Video Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406, 1413-1415 (9th Cir. 1989). Absent a special statute providing for nationwide service of process, the Fourteenth Amendment "minimum contacts" standard applies. *See supra* p. 8 n. 2. Section 12 of the Clayton Act, 15 U.S.C. § 22, only provides for extended jurisdiction and nationwide service of process on *corporate* defendants.

[4] The Ninth Circuit, recognizing the "hybrid" nature of MDL 633, accorded *res judicata* effect to the injunctive aspect of that case (which does not require notice) and rejected *res judicata* treatment for the damage claims (which does require notice). *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *pet. for*

Arizona and Wisconsin plaintiffs were entitled to the opportunity to opt-out before being bound by a settlement that foreclosed those claims.[5]

II. PETITIONERS' "STATE ACTION" AND "FILED TARIFF" ARGUMENTS ARE FRIVOLOUS.

A. State Action Immunity

While none of the defendants raised state action as a basis for summary judgment in the district court, that court relied upon state action as an alternate ground for its judgment dismissing the case. Accordingly, it was proper for the Court of Appeals to address the issue. The decision of the Court of Appeals on state action is fully consistent with its own earlier decision in *TIRBA* and with the precedents of this Court.

The test for state action immunity has two prongs: (1) actions alleged to be violations of the antitrust laws must

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cert. filed (June 15, 1993); Petitioners' App. at 12a (emphasis in original).

[5] If the MDL 633 Court intended to bind the settling plaintiffs with regard to claims for money judgments, as the Third and Ninth Circuits concluded, the failure to provide absent class members as opportunity to opt-out was a denial of due process under *Shutts*. 472 U.S. at 812. If, on the other hand, MDL 633 was properly certified under Rules 23(b) (1) and (b) (2) because the damage claims were dropped, then the judgment in that case could have no *res judicata* effect concerning claims wholly or predominantly for money damages. The doctrine of *res judicata* does not apply to issues that could not have been raised in the prior action. *Federal Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

be taken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation and (2) there must be active state regulation. *See California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). The proof needed to establish a state policy to displace competition is proof that the legislature (1) authorized the challenged conduct and (2) intended to displace competition with regulation. *Traweek v. City and County of San Francisco*, 920 F.2d 589, 591 n. 1 (9th Cir. 1990). It is beyond dispute that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it. . . . " *Parker*, 317 U.S. at 351. Private parties obtain immunity only if the State acting as sovereign intends to displace competition. If Petitioners' position were correct, state legislatures could simply repeal the federal antitrust laws by authorizing antitrust violations (without providing any regulatory substitute), turning *Parker* on its head. As this Court explained in *Federal Trade Comm'n. v. Ticor Title Ins. Co.*, "a State may not confer antitrust immunity on private persons, . . . " although "it may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details." 112 S.Ct. at 2176.[6]

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[6] Although the Ninth Circuit did not rely upon collateral estoppel in deciding the state action issue, that doctrine provides yet another basis for its decision. The immunity in Arizona of five of the six petitioners was litigated and decided some eleven years ago in litigation involving the same Arizona legislation:

> [T]he Arizona Legislature did not intend to replace competition with public regulation of escrow rates. . . . [T]he Court concludes that the defendants

Respondents also contended below that the Wisconsin regulatory scheme failed to satisfy the first prong of the *Midcal* test. The Ninth Circuit did not address this contention in view of this Court's decision in *Federal Trade Comm'n. v. Ticor Title Ins. Co.* that there was no active supervision of rate making in Wisconsin. Given that Wisconsin failed to satisfy the second prong, it was unnecessary in the Ninth Circuit's view to address whether it satisfied the first prong. In light of that decision of this Court, the Ninth Circuit's reversal of the district court's grant of summary judgment on grounds of state action immunity clearly was correct.[7]

B. Filed Tariff Doctrine

Keogh v. Chicago and N.W. Ry. Co., 260 U.S. 156 (1922), has no bearing on this case. As this Court made clear in *Square D Co. v. Niagra Frontier Tariff Bureau*, 476 U.S. 409,

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may not successfully interpose the state action defense.

TIRBA, 700 F.2d at 1253. This issue, having been actually and necessarily determined in 1981, is conclusive in this case. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

[7] Petitioners' argument under Section 16(a) of the Clayton Act (Petition for Certiorari at 25) is misplaced. It confuses collateral estoppel and *stare decisis*. Furthermore, it ignores the fact that the instant petition arises from the granting of a motion for summary judgment on a record comprised essentially of the same record developed by the FTC. In view of the fact that the record reviewed by the Ninth Circuit in this case was therefore virtually identical to that reviewed by this Court in *Federal Trade Comm'n. v. Ticor Title Ins. Co.*, there is no basis for alleging the Ninth Circuit erred in following this Court's opinion.

420 (1986), the *Keogh* doctrine was an "interpretation of the [Interstate Commerce Act] statutory scheme. . . ." This Court has not applied the *Keogh* doctrine to various other federal statutory schemes. For example, in *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 215, *as amended*, 383 U.S. 932 (1966), this Court refused to apply *Keogh* to the Federal Maritime Act because "the Shipping Act gives the Federal Maritime Commission far more limited authority over rates than the Interstate Commerce Act gives the ICC." *Square D Co.*, 476 U.S. at 422 n. 29, citing *Carnation*, 383 U.S. at 215.

This case involves a state regulatory scheme that does not resemble the pervasive regulation involved in *Keogh*. The Arizona and Wisconsin statutes, unlike the Interstate Commerce Act, fail to provide for affirmative governmental authority, permit automatic enactment of rates unless disapproved, do not require that rates be subject to public notice, comment and hearings, and do not involve active supervision. This type of passive regulatory scheme has never been found to preclude the treble damage remedy of the Sherman Act. *See Wileman Brothers and Elliott, Inc. v. Giannini*, 909 F.2d 332, 337-338 (9th Cir. 1990); *City of Long Beach v. Standard Oil Co.*, 872 F.2d 1401, 1409 (9th Cir. 1989).[8]

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[8] With respect to Arizona, the *Keogh* defense may not be available to five of the six Petitioners because the Arizona district court in *TIRBA*, reviewing the same regulatory scheme in litigation involving the same defendants, rejected the defense, stating "the regulation . . . is not of the scope that would preclude judicial scrutiny." *In re Ariz. Escrow Fee Antitrust Litig.*, 1981-2 Trade Cases (CCH) ¶ 64,429, 75,102 (D. Ariz. 1981).

CONCLUSION

There was no error in the Court of Appeals' decision, and further review by this Court is not warranted. Respondents respectfully submit that the writ of certiorari should be denied.

Respectfully submitted,

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Although the district court's 1981 *Keogh* ruling was subsequently vacated when the case was settled, that does not necessarily rob the ruling of collateral estoppel effect. *See Bates v. Union Oil Co. of Calif.*, 944 F.2d 647, 650 (9th Cir. 1991).

APPENDIX

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Affidavit of Gary P. Brady, dated January 30, 1990;
Excerpts of Record at pp. 145-146.....App. 1

AFFIDAVIT

STATE OF MASSACHUSETTS)
) ss.
County of Suffolk)

GARY P. BRADY, first being duly sworn and upon his oath, states as follows:

1. I am a member of the Bar of the State of Arizona. This affidavit is based on my own personal knowledge.

2. From August 1983 to May 1988, I was employed by the Arizona Attorney General with the Antitrust Division of that office. In that capacity, I represented Tucson Unified School District and Phoenix Elementary No. 1 School District and the State of Arizona in that litigation known as *In re Real Estate Title Insurance and Settlement Services Antitrust Litigation*, MDL 633 (E.D. PA) and in *Tucson Unified School District and Phoenix Elementary School District No. 1 v. Chicago Title Insurance Co., et al.* (Pima County Superior Court No. 246527).

3. Shortly after the District Court in Pennsylvania denied opt outs and entered judgment in MDL 633, I asked counsel for the class representatives why they made no effort to assert a claim for damages based on Arizona's antitrust law, thereby avoiding any state action immunity problems. The response was that because the class representatives' counsel were so accustomed to litigation under federal statutes, no consideration at all was given to whether there was an action based on Arizona antitrust law. In this case, the class representatives never tries to assert a claim based on Arizona law and never even though about doing so.

5. On September 19, 1985, after the district court approved the settlement, counsel for the defendants met with Bob Corbin, Arizona Attorney General, at his office in Phoenix, Arizona. I was present at that meeting. During the meeting, defendants' counsel admitted that the class representatives' lawyers were the only real gainers in the settlement of MDL 633.

6. Counsel for the class representatives admitted to me that at the time the settlement was approved and until I brought it to their attention, the class representatives did not know about the district court decision in *In re Arizona Escrow Fee Antitrust Litigation*, 1981-2 Trade Cas. (CCH) ¶ 64,429 (D. Ariz. 1981) wherein the court held that the *Keogh* doctrine did not apply.

/s/ Gary P. Brady
GARY P. BRADY

SUBSCRIBED AND SWORN to before me this 30th day of January, 1990.

/s/ Marie Giannino
Notary Public

My Commission Expires:
10/19/95

Supreme Court, U.S.
FILED
JUL 29 1993
OFFICE OF THE CLERK

No. 92-1988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TICOR TITLE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

WALTER THOMAS BROWN and JEFFREY L. DZIEWIT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION

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IN THE

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION

I. THE PETITION PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION THAT IS WORTHY OF REVIEW BY THIS COURT.

The principal question presented is whether a court may refuse to honor a prior federal class action judgment on grounds that absent class members with monetary claims have an unqualified due process right to opt out of a class action, even one properly certified under Fed. R. Civ. P. 23(b)(1) and (b)(2) which deliberately provide for no opt-out right. The Ninth Circuit found such a due process right. Respondents' brief confirms the importance of this Court's review and correction of that ruling, both by what the brief fails to say and by the little it says. Brief in Opposition ("Opp.") 6-10.

Notably, respondents have virtually nothing to say in response to the reasons stated in the petition for granting certiorari. They do not deny that the Ninth Circuit's finding of an opt-out right conflicts with the considered

judgment of the drafters of Rule 23, with Congress's provision for multidistrict litigation (28 U.S.C. § 1407), and with common practice and numerous appellate-court rulings. Nor do respondents dispute that the Ninth Circuit's decision will have dramatically destructive consequences for the fair and efficient conduct of class actions. Nor, finally, do they contest the obvious need for this Court to clarify *Phillips Petroleum Co. v. Shutts ("Shutts")*, 472 U.S. 797 (1985), if that decision is to be extended to the federal-court context. These are reasons enough to grant the petition.

Respondents do briefly attempt to defend the Ninth Circuit's judgment, but their argument is all but a confession that the opt-out ruling is indefensible. Respondents' main defense of the judgment is that "absent plaintiffs must receive proper notice." Opp. 6; *see also id.* at 6-7, 8-9, 9 n.4. The indisputable fact, however, is that the Ninth Circuit's holding has nothing to do with the adequacy of notice: what the court held is that a right to *opt out* is required by due process. Pet. App. 11a-12a. The court of appeals took as a given that notice was adequate, for the simple reason that respondents have never challenged the adequacy of notice in this case.[1] Thus, respondents' primary defense of the Ninth Circuit judgment is a plea to sustain it on an alternative ground—the right to adequate notice. Not only is that plea an improper one, since the ground was not raised below (and is meritless), but by leading their argument with such a plea, respondents effectively acknowledge that the Ninth Circuit was wrong in its opt-out ruling.

[1] In addition to arguing that they were inadequately represented in the multidistrict proceeding—an argument that the Ninth Circuit rejected (Pet. App. 8a-11a)—respondents argued *only* that due process required a right to opt out. *See* Brief of Appellants [Respondents] in Ninth Circuit at 25-29 (arguing for right to opt out; no mention of notice); Reply Brief of Appellants in Ninth Circuit at 2-5 (same); Plaintiffs' [Respondents'] Response in Opposition to Defendants' [Petitioners'] Motion for Summary Judgment at 27-28 (same).

When respondents finally speak to the question of a right to opt out, they simply assert that "*Shutts* itself makes clear that the same constitutional principles apply in a federal forum" as in state court. Opp. 8. But *Shutts* could not possibly make that clear, because the case involved only *state*-court jurisdiction. Not surprisingly, then, the Court in *Shutts* undertook no discussion whatever of the multidistrict litigation statute, the nationwide jurisdiction of federal courts, or any of the other considerations bearing on the merits of any constitutional claim for opt-out rights in federal court.[2]

If *Shutts* is to be relied on to justify such rights, an argument must be made for extending *Shutts*. That respondents instead pretend that *Shutts* already settles the question merely reconfirms that, as the petition shows, any such extension would be wrong. This is particularly true in a federal case like this one, where Congress has authorized a nationwide consolidated proceeding. The Ninth Circuit decision refuses to honor the result of exactly such a proceeding, thereby compelling multiple, repetitive litigation.

Respondents appear to make one attempt to explain why *Shutts* should be extended to apply in federal as well as state court. They state that the due-process ruling of *Shutts* "do[es] not distinguish between absent *resident* class members and absent *non-resident* class members"— thus apparently arguing that *Shutts* involved a procedural-fairness right possessed by *all* unnamed plaintiffs, rather than an issue of personal jurisdiction over out-of-state plaintiffs. Opp. 8-9.[3] But that view is wrong: any read-

[2] *See* 7A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 1757, at 90 (1986) (*Shutts* leaves "unanswered . . . the question whether the same due process restraints exist for federal class actions as those Justice Rehnquist enumerated for plaintiff class members").

[3] It is possible that respondents mean to address only the requirement of notice: the paragraph in which they make this argument twice adverts to the issue of notice. Opp. 8-9. Of course, if they

ing of the whole *Shutts* opinion (as opposed to one sentence in isolation) shows that the case concerned precisely the prerequisites for personal jurisdiction over "out-of-state" plaintiff class members—*i.e.* those without minimum contacts with the State. 472 U.S. at 807. As to those class members, the state court's jurisdiction was found based on consent, which was inferred by the *Shutts* Court from a failure to exercise a right to opt out. *Id.* at 812-813. Equally important, respondents' position confirms that the Ninth Circuit decision will be read, as its unqualified language indicates, to establish that all class-action plaintiffs with monetary claims have a constitutional right to opt out (Pet. App. 12a), regardless whether they have minimum contacts with the forum. That ruling urgently demands review because, as the petition shows, it is wrong, unsupported by *Shutts*, contradicted by numerous circuit-court rulings, and destructive of essential established practice under the express terms of Rule 23(b)(1) and (b)(2).

Respondents end their defense of the Ninth Circuit ruling under *Shutts* by trying (Opp. 9-10) to bring it within this Court's limitation of the *Shutts* decision to cases "wholly or predominately for money judgments." 472 U.S. at 811 n.3. This effort not only fails on its own terms,[4] but is irrelevant to the fundamental error of the

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are not talking about opt-out rights, the discussion is irrelevant to the Ninth Circuit's ruling.

[4] As noted in the petition at 16 n.10, the quoted limitation of the holding in *Shutts* echoes precisely the traditional Rule 23 limitations on the use of non-opt-out class actions. The Ninth Circuit did not dispute that the MDL 633 class was properly certified under the standards of Rule 23(b)(1) and (b)(2) and did not find that the relief sought or provided in MDL 633 was "wholly or predominately for money damages." Rather, it found that the MDL 633 suit "involved the foreclosure of substantial damage claims." Pet. App. 12a. The Ninth Circuit's ruling thus was based on the existence of asserted monetary claims in MDL 633, rather than any assessment of their significance in relation to the case as a whole, and thus is beyond the scope of the *Shutts* holding as limited by the express language of the Court.

Ninth Circuit warranting review. The Ninth Circuit erred in extending the *Shutts* opt-out holding to the judgment in MDL 633 because a right to opt out was not necessary to establish jurisdiction of the *federal* court over that earlier multidistrict class action. That error is independent of the mix of monetary and non-monetary relief provided by the MDL 633 class action judgment. Respondents simply sidestep the basic issue when they argue about the Ninth Circuit's application of the "wholly or predominately" limitation, which furnishes an *additional* reason why *Shutts* does not apply in this case.

Respondents' brief provides no colorable defense of the Ninth Circuit decision applying *Shutts* to disregard the prior federal class action judgment in MDL 633. The important and fundamental constitutional issues raised by the Ninth Circuit's decision warrant review in this Court.

II. THE OTHER CLEAR ERRORS MADE IN THE COURT OF APPEALS DECISION WARRANT CORRECTION BY THIS COURT.

A. State Action Doctrine.

Arizona. The basis of the Ninth Circuit's refusal to apply the state action doctrine in Arizona was its view that the first prong of that doctrine, the requirement of a clearly articulated state policy, was not satisfied because the Arizona statutes authorizing title insurance rating bureaus did not "displace competition with regulation." Pet. App. 13a. The petition at 23-24 explains that this holding is directly contrary to the ruling of this Court in *Southern Motor Carriers Rate Conference v. United States ("Southern Motor Carriers")*, 471 U.S. 48, 59-60 (1985), that a state policy permitting but not compelling participation in rating bureaus satisfies the state policy prong of state action analysis. The state regulatory policy upheld in *Southern Motor Carriers* manifestly did *not* displace all competition with regulation. *Id.* at 59. The

Arizona statutes squarely satisfy the state policy requirement of *Southern Motor Carriers.*[5]

Respondents make no attempt to address the conflict between the Ninth Circuit decision and this Court's holding in *Southern Motor Carriers.* Instead, respondents simply assert that "[i]f petitioners' position were correct, state legislatures could simply repeal the federal antitrust laws by authorizing antitrust violations (without providing any regulatory substitute)." Opp. 11. That claim is patently wrong: any such outcome is precluded by the *second* prong of state action analysis—the requirement of active supervision. Thus, respondents' sole attempt to defend the Ninth Circuit ruling on the first prong of the state action doctrine is wholly without merit.[6]

This Court's decision last Term in *FTC v. Ticor Title Ins. Co. ("Ticor"),* 112 S.Ct. 2169 (1992), cited at Opp. 11, did not involve application of the first but rather the *second* prong of the state action doctrine, the requirement that the state "actively supervise" its regulatory policy. The Court's reference there to the displacement of competition was in that context—it said that a State "may displace competition with active supervision." 112 S.Ct. at 2176. The Court gave no indication of any change in its traditional two-part state action formula. Indeed the Court restated the first prong of the state

[5] As noted in the petition, Arizona by statute specifically authorizes joint rate filing by title insurance rating bureaus as part of the state's "extensive" program of regulation over title insurance rates. *Tucson Unified School Dist. v. Chicago Title Ins. Co.*, 167 Ariz. 114, 115, 804 P.2d 843, 844 (App. 1991). Indeed, in the FTC proceeding that was the subject of this Court's decision last term, it was conceded that Arizona's policy permitted filing of joint rates by title insurance rating bureaus and satisfied the first prong of the state action test. *Ticor Title Ins. Co. v. FTC*, 922 F.2d 1122, 1135 (3d Cir. 1991).

[6] In the court of appeals, respondents expressly rejected the principle on which the Ninth Circuit relied; they said, "[t]he principle that compulsion of rate-making by the states is necessary for state action immunity was rejected by the Supreme Court in *Southern Motor Carriers.*" Appellants' C.A. Br. at 30 n.6.

action test in terms that embodied the holding of *Southern Motor Carriers*: the State must have "articulated a clear and affirmative policy to *allow* the anticompetitive conduct." *Id.* at 2175 (emphasis added).[7]

Wisconsin. The Ninth Circuit's state action ruling in Wisconsin was based solely on its *sua sponte* fact finding that the extent of state supervision there did not satisfy the second prong of the state action test. Pet. App. 14a. The petition at 24-25 points out that by basing that fact finding on this Court's decision last Term in the *Ticor* case, the Ninth Circuit's decision violates section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), which directs that "collateral estoppel effect shall not be given to any finding" made in an FTC proceeding.

Respondents reply to this clear error by mischaracterizing the record below. Contrary to their assertions (Opp. 12 n.7), no motion was filed in the district court seeking summary judgment on the basis of the state action doctrine. The record before the district court was most emphatically *not* "essentially . . . the same record developed by the FTC." *Id.* On the contrary, there was no factual record at all concerning the nature or extent of state regulatory supervision. Moreover, the Ninth Circuit did not purport to base its ruling on any review of the record developed in the district court, but relied entirely on the result of this Court's review of the FTC proceeding. Pet. App. 14a. To have made its ruling in such a fashion is a

[7] Respondents also incorrectly argue (Opp. 11 n.6) that collateral estoppel provides a potential basis for the Ninth Circuit's holding as to Arizona, based on the eleven-year-old decision in *United States v. Title Ins. Rating Bureau of Arizona*, 700 F.2d 1247, 1253 (9th Cir. 1983). This was not, of course, the basis for the Ninth Circuit's decision here. In any event, the reasoning underlying that earlier decision was vitiated by the intervening ruling of this Court in *Southern Motor Carriers.* Where the controlling legal principles have changed substantially between the previous judgment and the later case, collateral estoppel does not bind a party to a past judgment that is contrary to the correct and controlling rule of law. *Montana v. United States*, 440 U.S. 147, 155 (1979).

violation of federal statutory law that warrants summary reversal.[8]

B. Filed Tariff Doctrine.

The Ninth Circuit refused to apply the filed tariff doctrine of *Keogh v. Chicago and N.W. Railway Co. ("Keogh")*, 260 U.S. 156 (1922), to bar respondents' damages claims, on the sole ground that the title insurance rates "were the product of unlawful activity" and "were not subjected to meaningful review by the state." Pet. App. 15a-16a. The petition at 26-27 points out that this reasoning is contrary to precedent of this Court, including *Keogh* itself and *Square D Co. v. Niagara Frontier Tariff Bureau ("Square D")*, 476 U.S. 409 (1986).

Respondents do not attempt to defend the Ninth Circuit's decision on the basis on which it was rendered, instead arguing that the filed tariff doctrine applies only to federal regulation under the Interstate Commerce Act. Opp. 12-13. This argument has no basis. The filed tariff doctrine has been applied to bar claims for damages based on filed rates in other regulated industries. *E.g. Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (natural gas rates).[9] Moreover, the case principally relied on by respondents, *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, *amended* 383 U.S. 932 (1966), did not even involve the filed tariff doctrine.[10]

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[8] Respondents suggest that the Ninth Circuit could have based its state action ruling as to Wisconsin on the first state action prong. Opp. 12. But the Ninth Circuit itself concluded that the statutory scheme in Wisconsin reflected the legislature's "intent to replace competition with regulation." Pet. App. 11a. Wisconsin's policy thus satisfies even the Ninth Circuit's view of the first state action prong.

[9] *See also, e.g., Berning v. Gooding*, 820 F.2d 1550 (9th Cir. 1987) (agricultural marketing orders); *City of Groton v. Connecticut Light & Power Co.*, 497 F. Supp. 1040 (D. Conn. 1980), *aff'd in part*, 662 F.2d 921 (2d Cir. 1981) (electric power rates); *City of Newark v. Delmarva Power & Light Co.*, 467 F. Supp. 763 (D. Del. 1979) (electric power rates).

[10] As this Court noted in *Square D*, "[t]he specific *Keogh* holding . . . was not even implicated" in the *Carnation* decision, which instead stands for the much more general proposition that anticompetitive activities "are not immunized from antitrust scrutiny simply because they occur in a regulated industry." 476 U.S. at 422 n.29 and 421. This Court noted that "a critical distinction remains between an absolute immunity from all antitrust scrutiny and a far more limited nonavailability of the private treble-damages remedy" under the filed tariff doctrine, 476 U.S. at 422 n.28, and refused to be governed by *Carnation* in applying the filed tariff doctrine.

Also ignoring the basis of the Ninth Circuit's ruling, respondents argue that the title insurance regulatory structures in Arizona and Wisconsin are too "passive" to come under the filed rate doctrine. Opp. 13. On the contrary, the regulatory systems of both States require title insurers to file their rates with the state regulators, and grant the regulators authority to order title insurers to discontinue use of rates that do not comport with the regulatory standards established by statute. A.R.S. §§ 20-341, 20-375, 20-376, 20-378; Wis. Stat. §§ 625.01, 625.11(1), 625.12, 625.13, 625.22. Title insurers are expressly prohibited from charging any fee or rate other than those on file with the state insurance departments. A.R.S. § 20-376(H); Wis. Stat. § 625.15, Wis. Admin. Code [Ins.] § 3.32(4)(a). Thus, as with the filed rates at issue in *Square D*, the title insurance rates filed with the Arizona and Wisconsin state insurance regulators were the "duly submitted, lawful rates under the [state statutes] in the same sense that the rates filed in *Keogh* were lawful." 476 U.S. at 419. Indeed, the Wisconsin Supreme Court has recently ruled that the filed tariff doctrine bars the pursuit of state law antitrust damage claims based on precisely the conduct at issue in this case. *Prentice v. Title Ins. Co. of Minnesota*, —— Wis. 2d ——, 500 N.W.2d 658 (1993).

By application of the filed tariff doctrine, even if an antitrust violation could be established, respondents may not recover antitrust damages for having been charged the lawful filed rates. The Ninth Circuit's ruling to the contrary is clear error and should be summarily reversed by this Court.

CONCLUSION

The Court should grant the petition for a writ of certiorari to review the refusal by the court of appeals to grant *res judicata* effect to the class action judgment in MDL 633. The Court should also correct the substantive legal errors made by the court of appeals, either on review if granted or by summary reversal.

Respectfully submitted,

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EDITOR'S NOTE

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No. 92-1988

ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TICOR TITLE INSURANCE COMPANY, *et al.*
Petitioners,

v.

WALTER THOMAS BROWN AND JEFFREY L. DZIEWIT, *et al.*
Respondents.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' MOTION TO DEFER BRIEFING AND ARGUMENT

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Respondents Walter Thomas Brown and Jeffrey L. Dziewit, representatives of a putative class of Arizona and Wisconsin residents, respectfully move this Court to defer the briefing and argument on the petition in the above-captioned case as set forth in the Court's order dated October 4, 1993.

On October 1, 1993, counsel for the Petitioners and Respondents wrote to the Clerk of the Court and advised the Court that a settlement had been reached by the parties. A copy of the parties' letter to the Court is attached hereto as Exhibit A. As stated in the parties letter, "the settlement reached by the parties is intended to moot the petition." Because the case was filed as a class action, the parties requested that the Court defer action on the then-pending petition until completion of the notice and approval required by Rule 23 in the District Court. See Exhibit A. Immediately upon learning that the Court had granted ceriorari, counsel for the undersigned contacted the Assistant Clerk of the Court and was advised that the Court had not been apprised of the parties' letter prior to granting the petition.

The parties' counsel have consulted regarding the proper procedure to be followed at this juncture, and have not been able to agree on how to proceed. Counsel for Petitioners suggested that the briefing on the petition go forward as scheduled while the parties seek expeditiously to implement the settlement in the District Court. Counsel for Respondents do not believe this is an appropriate procedure. Rather, the procedure followed by this

Court in Charles Henson v. East Lincoln Township, U.S. Supreme Court No. 87-5461, seems to be the only proper course. In that case, we are advised that the Court deferred briefing and oral argument while the parties sought to complete the settlement. Respondents believe that procedure -- deferral of the briefing and argument pending completion of settlement procedures in the District Court -- should be adopted by this Court in this case.

The parties expect to submit a final settlement agreement forthwith. It is reasonably anticipated that all proceedings in the District Court, including notice and approval, can be completed within 120 to 180 days.

Given the existence of a settlement, a copy of which is attached hereto as Exhibit B, there is no case or controversy to be resolved by the Court. The only possibility that the Court would have to entertain the petition would arise in the event that the District Court, after a fairness hearing, does not approve the settlement, orders a form of notice materially more expensive than the form of notice agreed to by the parties, or if an extremely large number of class members seek to opt out of the settlement. None of these events are likely. The course suggested by Petitioners' counsel, which would involve proceeding with the briefing and argument of the petition, would be anomolous in light of the parties' obligation to proceed expeditiously to complete their settlement.

For the foregoing reasons, Respondents respectfully submit that the Court should defer the briefing schedule set forth in its October 4, 1993 order for 120 days which should allow adequate time for the parties to complete the proceedings in the District Court or, in the unlikely event those proceedings have not yet concluded, for the parties to request a brief additional extension of the briefing schedule should that be necessary.

RESPECTFULLY SUBMITTED this 13th day of October, 1993.

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October 1, 1993

BY HAND

Frank Lorson
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: No. 92-1988, Ticor Title Insurance Co. v. Brown

Dear Mr. Lorson:

We are writing to request that the Court defer any action with respect to the petition for certiorari in the above-captioned case to allow the lower court to consider a settlement just reached by the parties. The petition was filed on June 15, 1993, an opposition was filed on July 15, and a reply to the opposition was filed on July 30, 1993. As of this date, the Court has not announced its ruling on the petition.

The reason for our request is that the settlement reached by the parties is intended to moot the petition. Because the case has been filed as a class action, however, Rule 23, Fed. R. Civ. Proc., requires that the settlement be approved by the court, after notice and a fairness hearing. Counsel for the parties will seek to implement this approval expeditiously and will advise the Court of any developments. If the settlement is approved, of course, the petition will be withdrawn.

Thank you for your attention to this matter.

Sincerely,

Joel I. Klein
Counsel of Record for
the Petitioners

Gerald D. W. North
Counsel of Record for
the Respondents

JIK:jac

EXHIBIT A

MEMORANDUM OF UNDERSTANDING

This memorandum summarizes the understandings reached with respect to the settlement of Brown v. Ticor Title Insurance Co., D.C. (Arizona) No. CV-90-0577-PHX-SMM, filed April 13, 1990, by the plaintiffs and defendants.

1. The settlement class will be defined to include purchasers of "title search and examination services" in Arizona and Wisconsin from all title insurers and their agents.

2. The settlement class will include persons who purchased "title search and examination services" in Wisconsin in 1981 through 1984 and in Arizona in 1981 and 1982.

3. The defendants believe that members of the settlement class and their addresses cannot be identified with reasonable effort through the business records of the defendants and that notice of the settlement by publication is the best notice practicable. The defendants agree to make available a reasonably representative sampling of their business records to allow the attorneys for the plaintiffs to confirm that notice by publication is the best notice practicable. Assuming subsequent agreement on this issue, notice of the settlement and of its benefits will be by publication in a manner and form to be subsequently agreed upon. Should the Court order notice in any form or manner that is substantially more expensive than that which the plaintiffs and defendants agree to recommend, the defendants may, at their option, terminate the settlement.

4. Class members may opt out of the settlement. However, defendants may reject the settlement if 5000 or more class members elect to opt out.

5. Members of the settlement class who purchased from one of the six defendants or their agents will be entitled to elect a cash option in the manner and in the amount described below. Those class members who purchased from one of the defendants or their agents who do not receive the cash option ("non-cash option class members") shall be entitled to receive the policy enhancement described below and the benefit described in paragraph 6.

6. Members of the settlement class who purchased from title insurers other than the six defendants or their agents will be provided the last $5,000 of insurance coverage without charge in connection with any new title insurance policy purchased from any of the defendants with respect to property located either in

EXHIBIT B

Arizona or Wisconsin within a one year period following the date that this settlement results in a final judgment order.

7. This settlement shall be without an admission of liability on the part of any of the defendants and shall result in a judgment dismissing all claims of the settlement class under federal and state antitrust laws with prejudice as to the six defendants, their respective agents, officers and employees. It shall be without prejudice to the claims of the settlement class as to any others.

8. It is agreed and understood that certain language and provisions of the Final Order and Judgment of June 10, 1986 in MDL 633 relating to the mechanics of the settlement, the benefits to the settlement class and the jurisdiction of the Court shall be made applicable herein as subsequently agreed upon.

9. The defendants shall pay such attorneys fees and costs as are subsequently agreed upon and approved by the Court. If the parties are unable to agree on the amount of attorney fees and costs the issue will be submitted to the Court for decision. In addition, the defendants shall pay the administrative costs of the settlement, including the cost of notice.

10. It is agreed and understood that regulatory approval may be necessary with respect to the provision of certain of the settlement benefits which are the subject of this understanding. The defendants agree that they will in good faith endeavor to secure any such regulatory approvals. In the event regulatory approval is conditioned upon material changes in the settlement benefits conferred herein or in any financial undertakings required of the defendants, the parties in good faith shall endeavor to negotiate comparable alternative benefits.

11. A member of the settlement class entitled to elect the cash option as provided above shall do so in the following manner:

a. submit a claim form within a 150 day period following final approval of the settlement or final publication, whichever is later;

b. the claim form shall include identification of the claimant by name and address as well as identification of the date of purchase, the identity of the title insurer or agent from whom purchased and some verification that the claimant received hese services from that title insurer or agent;

c. a mechanism will be subsequently agreed upon to review these claim forms to allow the claim to be accepted or rejected;

d. those claimants whose claim is approved shall be entitled to the cash amount described below.

12. In Wisconsin, each class member whose cash election is approved shall be entitled to receive $10.90 but in no event shall the total liability of the six defendants in this respect exceed $1,587,326. In Arizona, each class member whose cash election is approved shall be entitled to receive $10.21 but in no event shall the total liability of the six defendants in this respect exceed $1,225,200. In the event the total claims in either state exceed the respective maximum liabilities set forth above, the individual cash payment to each claimant shall be reduced proportionally.

13. Those members of the settlement class entitled to elect the cash option as provided above who do not receive it ("non-cash option class members") shall receive a policy enhancement from the defendant who issued the policy. Specifically, each of the defendants shall increase the face amount of the title insurance policy issued to the non-cash option class members by an amount designed to reflect the impact of inflation as measured by the most recently available Department of Commerce Composite Construction Cost Index since January 1, 1981, to the date of the final judgment order, without additional charge.

14. If the Court does not approve the settlement described herein or any material part of it, the agreement will be terminated unless all parties agree to proceed with the agreement as modified by the Court. If the agreement is terminated or becomes null and void for any reason, the litigation shall return to the posture in which it stood as of September 30, 1993, and neither the fact nor the substance of the agreement nor the negotiations preceding it shall be used for any purpose in the litigation.

15. It is further agreed and understood that the parties to the litigation and their undersigned counsel shall endeavor in good faith to achieve the consummation of the settlement described herein through a definitive written agreement and the necessary approval of the Court.

16. The undersigned are authorized to execute this memorandum as representatives of all plaintiffs and defendants, respectively.

Dated: October 1, 1993

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First American Title Insurance Company

On behalf of all Defendants

PROOF OF SERVICE

The undersigned hereby certifies that s/he is a member of the Bar of this Court and that all parties hereto have been served with a copy of the foregoing RESPONDENTS' MOTION TO DEFER BRIEFING AND ARGUMENT by mail this 13th day of October, 1993, addressed as follows:

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No. 92-1988

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1993

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Petitioners,

v.

WALTER THOMAS BROWN AND JEFFREY L. DZIEWIT,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' OPPOSITION TO MOTION TO DEFER FURTHER PROCEEDINGS

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OCTOBER TERM, 1993

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Respondents.

On Writ of Certiorari
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for the Ninth Circuit

**PETITIONERS' OPPOSITION
TO MOTION TO DEFER FURTHER PROCEEDINGS**

Petitioners respectfully oppose the motion of respondents to defer briefing and oral argument in this case. This Court granted certiorari on October 4, 1993. At the same time, it set an expedited briefing schedule, with the opening brief due shortly (November 16) and an expectation that oral argument will be heard early next year. Now that the Court has granted the petition, we suggest, these proceedings should go forward while the parties continue the drawn-out and uncertain process required before any settlement will moot the case, which is unlikely to occur before the Court resolves the important question on which certiorari was granted.

This Court granted certiorari to review a decision of the Ninth Circuit imposing significant constitutional constraints on the Federal Rules of Civil Procedure's provision for nationwide mandatory class actions. As the grant of the petition confirms, the case presents a question of great significance to the federal judicial system warranting this Court's immediate resolution. This process should not be derailed in this case, with the inevitable postponement in providing litigants and lower courts a definitive answer to the question, unless there is so high a likelihood that the case will become moot before this Court's decision that the Court's expenditure of resources in deciding the case will predictably prove wasted. There is no such likelihood.

Contrary to respondents' assertion (Resp. Motion at 3), there continues to be a live case or controversy in this case. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 465 n.3 (1978) ("[P]etitioner in this case . . . did not stipulate to dismissal to its petition. In view of the tentative nature of the settlement, this case is not moot."). As is apparent from the Memorandum of Understanding attached to respondents' motion, for the case to become moot, a definitive class-action settlement agreement still has to be negotiated between counsel for the parties; any resulting settlement proposal will have to be submitted to the district court for preliminary approval under

Rule 23, Fed. R. Civ. P.; notice in an agreed-to form, an opportunity for objections, and a hearing will have to be provided; the district court will have to approve the proposed form of notice or insist on modifications (and the parties will have to decide whether to accept any such modifications); the court will have to consider any objections made to the settlement and decide whether to insist on modifications as a condition of approval; each party will have to decide whether to accept any such modifications or to withdraw its agreement to the proposed settlement; if the district court approves a final settlement, the parties will have to await the running of the time for appeals by any objecting class member (30 days, under Fed. R. App. P. 4) or await the outcome of any appeal actually filed, which might result in reversal of the district court approval followed by further proceedings in district court. State regulatory agencies will also have to approve any settlement; that process, too, might be unsuccessful or produce demands for modification that, in turn, could scuttle a final settlement. None of this has yet occurred.

Respondents themselves estimate that the process will take up to six months (i.e., until May 1994). Resp. Motion at 3. Petitioners believe that there is a reasonable prospect that it will take significantly longer. Lengthy delay is especially likely if class members object and pursue appeals; and that

prospect is hardly unlikely in this case, itself a case brought by objecting members of an earlier class challenging as inadequate the settlement of the earlier class action. Indeed, the original settlement in the underlying action, which respondents have challenged in this case, took almost three years to become final -- more than eight months for the district court process (Pet. App. 31a, 35a) and approximately two additional years for appeals (id. at 78a, 79a). Finally, of course, it is possible that, in the end, no settlement will survive this review process.

In these circumstances, particularly given the expedited schedule in this Court, it is reasonable to expect that this case will remain live at the time of an anticipated decision, in the spring of 1994. Because the issue presented warrants this Court's immediate resolution, we submit, the case should proceed in this Court. At the same time, petitioners will diligently pursue the settlement process. We will inform the Court immediately if and when the case becomes moot.[1]

---

1 Respondents cite one case in support of their deferral request, Henson v. East Lincoln Township. Resp. Motion at 3. But since any such request must be judged on its own facts, the granting of deferral in that one case hardly means that deferral should be granted here. Notably, in Henson, the parties jointly asked for deferral of proceedings, presumably reflecting a shared assessment of the likelihood of ultimate mootness (and, perhaps, of the relative unimportance of immediate resolution of the legal question presented).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petitioners' Opposition to Motion to Defer Further Proceedings in Ticor Title Insurance Company, et al. v. Walter Thomas Brown and Jeffrey L. Dziewit, et al., No. 92-1988, were served by first-class mail, postage pre-paid, this 22nd day of October 1993, on the following:

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SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief for Petitioners and Joint Appendix in No. 92-1988, Ticor Title Insurance Co. et al. v. Brown and Dziewit, were sent by Federal Express on this 15th day of November, 1993 to:

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Joel I. Klein

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' REPLY IN SUPPORT OF THEIR MOTION TO DEFER BRIEFING AND ARGUMENT

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6 pp

Respondents request leave to file this reply in support of their motion to defer briefing and argument by facsimile in view of the fact that service of the Petitioners' opposition was not received until yesterday, October 27, 1993.

Petitioners' opposition to the motion of Respondents to defer briefing in this case is hypocritical. On the one hand, Petitioners acknowledge their obligation under the Memorandum of Understanding dated October 1, 1993, entered into before this Court granted certiorari, to "endeavor in good faith to achieve the consummation of the settlement described herein. . . ." On the other hand, they ask the Court to proceed with the petition, recognizing on page 1 of their opposition brief that this would likely result in a ruling by this Court before settlement proceedings could be completed. The inherent conflict between Petitioners' obligation, reiterated in their opposition, to diligently pursue the settlement process and their stated desire, now that the Court has granted certiorari, to obtain a ruling in this Court before settlement proceedings can be completed, is obvious.[1] Presumably, if this Court rules in favor of Petitioners, Petitioners will take the position that the settlement agreement is no longer binding. Will Petitioners, if they fail, seek to bind Respondents to the settlement agreement?

[1] An example of this conflict has already occurred. Only days after filing their opposition brief containing representations that they would proceed expeditiously with settlement proceedings in the District Court, one of Petitioners' counsel advised counsel for Respondents that in his view the District Court likely lacked jurisdiction to consider the settlement because the Ninth Circuit stayed a return of the mandate pending review in this Court.

It was to avoid such a circumstance that the parties jointly petitioned this Court to defer any action with respect to the petition for certiorari pending the completion of the proceedings required by Rule 23 with respect to their settlement.

The joint request for deferral of proceedings was an integral part of the bargained-for consideration in the settlement. In the weeks leading up to the parties' Memorandum of Understanding (attached to Respondents' motion as Exhibit B), the pendency of the petition and the risk that, if granted, there would be additional delay in payments to the class as well as the inherent uncertainty involved in having a previously-decided issue reexamined, figured in the parties' negotiations. The Respondents agreed to take less in settlement than they might otherwise have demanded in order to eliminate the factors of uncertainty and delay. Petitioners, on the other hand, agreed to forego the opportunity of review in this Court in order to avoid a larger demand and the cost of further proceedings. This resulted in the parties' joint October 1, 1993 letter in which the Court was requested to "defer any action with respect to the petition for certiorari . . . to allow the lower court to consider [their] settlement." As the parties' joint submission states, "[t]he reason for our request is that the settlement reached by the parties is intended to moot the petition." (See Exhibit A to Respondents' motion) (emphasis supplied).

Petitioners' citation of Coopers & Lybrand v. Livesay, 437 U.S. 463, 465 n. 3 (1978) on the issue of mootness is misdirected.

Petitioners' quotation from the cited footnote omits the reference to the disposition in the companion case where "[r]espondents and petitioners . . . agreed to dismiss that petition. . . ." While the parties in this case did not agree to "dismiss" the petition, they did agree to "defer" the petition.

In these circumstances, the situation before the Court in this case is apparently the same as that in Hanson v. East Lincoln Township, where, as described in Petitioners' opposition to this motion, "the parties jointly asked for deferral of proceedings, presumably reflecting a shared assessment of the likelihood of ultimate mootness. . ." (emphasis in original). While Petitioners now seek to dwell on possible impediments to the satisfactory culmination of the settlement, the joint request for deferral of proceedings that was submitted here necessarily reflected the same "shared assessment" of likely ultimate mootness that Petitioners attribute to the comparable joint request in Hanson.

In light of the parties' joint request for deferral, the only proper course is to grant the motion of Respondents.

RESPECTFULLY SUBMITTED this 28 day of October, 1993.

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PROOF OF SERVICE

The undersigned hereby certifies that s/he is a member of the Bar of this Court and that all parties hereto have been served with a copy of the foregoing RESPONDENTS' REPLY IN SUPPORT OF THEIR MOTION TO DEFER BRIEFING AND ARGUMENT by facsimile and mail this 28th day of October, 1993, addressed as follows:

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Supreme Court, U.S.
FILED
NOV 16 1993
OFFICE OF THE CLERK

No. 92-1988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TICOR TITLE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

WALTER THOMAS BROWN and JEFFREY L. DZIEWIT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI FILED JUNE 15, 1993
CERTIORARI GRANTED OCTOBER 4, 1993

BEST AVAILABLE COPY

35 pp

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U.S. DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
(PHOENIX)

Civil Docket for Case #: 90-CV-577

BROWN, *et al.*

v.

TICOR TITLE INS. CO., *et al.*

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
4/13/90	1	Class Action COMPLAINT for violation of the Federal Antitrust Laws FILED AND SUMMONS ISSUED (ab) [Entry date 04/18/90]
9/14/90	27	MOTION for summary judgment by defendants [27-1] (jh) [Entry date 09/17/90]
9/14/90	28	LR 11(1) STATEMENT OF FACTS by defendant in supprt of motion for summary judgment by defendants [27-1] [27-1] (jh) [Entry date 09/17/90]
12/7/90	46	RESPONSE by plaintiff in oppsn to motion for summary judgment by defendants [27-1] (jh) [Entry date 12/11/90]
12/7/90	47	LR 11(1) STATEMENT OF FACTS by plaintiff re motion response [46-1] (jh) [Entry date 12/11/90]
12/7/90	48	EXHIBITS to plas' resp in oppsn to mtn for sj (Re: [46-1] (jh) [Entry date 12/11/90]

DATE	NR.	PROCEEDINGS
12/21/90	53	REPLY by defendants except Ticor Title to response to motion for summary judgment by defendants [27-1] (sd) [Entry date 12/24/90]
3/5/91	64	MEMORANDUM AND ORDER: by Judge Stephen M. McNamee granting motion for summary judgment by defendants [27-1] terminating case (cc: all counsel) (aj)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Case No. CIV90-0577 PHX WPC

WALTER THOMAS BROWN and JEFFREY L. DZIEWIT,
On Behalf of Themselves and All Others
Similarly Situated,
Plaintiffs,

v.

TICOR TITLE INSURANCE CO., a California corporation; CHICAGO TITLE INSURANCE COMPANY, a Missouri corporation; SECURITY UNION TITLE INSURANCE CO., as successor in interest to SAFECO TITLE INSURANCE COMPANY, a California corporation; FIRST AMERICAN TITLE INSURANCE COMPANY, a corporation; LAWYERS TITLE INSURANCE CORPORATION, a Virginia corporation; and STEWART TITLE GUARANTY COMPANY, a Texas corporation,
Defendants.

CLASS ACTION COMPLAINT FOR VIOLATION OF THE FEDERAL ANTITRUST LAWS (15 U.S.C. § 1)

PLAINTIFF DEMANDS A TRIAL BY JURY

Plaintiffs, by their attorneys, for their Complaint against Defendants, allege as follows:

I

JURISDICTION AND VENUE

1. This Complaint is filed pursuant to Section 4 and Section 16 of the Clayton Act (15 U.S.C. § 15, § 26), and 28 U.S.C. § 1332 and § 1337, to recover three-fold the damages sustained by reason of Defendants' violations, as alleged herein, of Section 1 of the Sherman Act (15 U.S.C. § 1). Venue is proper in this Court pursuant to 15 U.S.C. § 22 and 28 U.S.C. § 1391(c).

2. The interstate and foreign trade and commerce described herein is carried on in part into, within and from the District of Arizona. Many of the acts complained of herein have been performed in part or in whole within the District of Arizona.

II

THE PARTIES

3. Plaintiff Walter Thomas Brown ("Brown") is a citizen of the State of Arizona. On or about August 10, 1983, Plaintiff Brown purchased title search and examination services from one of the Defendants.

4. Plaintiff Jeffrey Dziewit ("Dziewit") is a citizen of the State of Wisconsin. On or about December 27, 1984, Plaintiff Dziewit purchased title search and examination services from one of the Defendants.

5. Defendants are competitors in the sale of title search, examination and settlement services and title insurance. In 1982, Defendants collectively accounted for 57 percent of the $1.35 billion title insurance industry based on gross operating revenue.

a. Defendant Ticor Title Insurance Company ("Ticor") is a corporation organized under the laws of the State of California, with its principal place of business at 6300 Wilshire Boulevard, Los Angeles, California 90048. Ticor conducts its title insurance business in 49 states and the District of Columbia, including Arizona.

b. Defendant Chicago Title Insurance Company ("Chicago") is a corporation organized under the laws of the State of Missouri, with its principal place of business at 111 West Washington Street, Chicago, Illinois 60602. Chicago conducts its title insurance business in 49 states and the District of Columbia, including Arizona.

c. Defendant Security Union Title Insurance Co. as successor in interest to Safeco Title Insurance Company ("Security") is a corporation organized under the laws

of the State of California, with its principal place of business at 13640 Roscoe Boulevard, Los Angeles, California 91409. Safeco conducts its title insurance business in 46 states and the District of Columbia, including Arizona.

d. Defendant First American Title Insurance Company ("First American") is a corporation organized under the laws of the State of California, with its principal place of business at 114 East 5th Street, Santa Ana, California 92701. First American conducts its business in 49 states and the District of Columbia, including Arizona.

e. Defendant Lawyers Title Insurance Corporation ("Lawyers") is a corporation organized under the laws of the State of Virginia, with its principle place of business located at 6630 West Broad Street, Richmond, Virginia, 23230. Lawyers conducts its business in 49 states and the District of Columbia, including Arizona.

f. Defendant Stewart Title Guaranty Company ("Stewart") is a corporation organized under the laws of the State of Texas, with its principal place of business located at Stewart Building, Galveston, Texas, 77550. Stewart conducts its title insurance business in 45 states and the District of Columbia, including Arizona.

III

CLASS ACTION ALLEGATIONS

6. Plaintiffs bring this action on their own behalf and as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure on behalf of a class consisting of all persons, except officers and directors of the Defendants and their immediate families, who purchased title search and examination services from Defendants in the following states (the "Class") during the period from January 7, 1981 to the present time, inclusive (the "Class Period"), and who sustained damages as a result thereof: (a) Arizona (the "Arizona Sub-Class") and (b) Wisconsin (the "Wisconsin Sub-Class").

7. The Class is so numerous that joinder of all its members is impracticable. During the Class Period, the Defendants sold title search and examination services to thousands of customers who acquired property in the States of Arizona and Wisconsin. The precise number of class members and their addresses are unknown to Plaintiffs but can be ascertained from the books and records of the Defendants or their agents.

8. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

(a) whether Defendants, through participation in rating bureaus or otherwise, agreed on the prices to be charged for title search and examination services during the period from January 7, 1981 to the present time, inclusive;

(b) whether Defendants' agreement or agreements to set or otherwise fix the prices to be charged for title search and examination services affected competition in the relevant market to the economic detriment of Plaintiffs and the Class;

(c) whether Defendants' conduct violated the Sherman Act;

(d) whether title search and examination services constitute the "business of insurance" within the meaning of the McCarran-Ferguson Act (15 U.S.C. § 1012(b)).

9. Plaintiffs' claims are typical of the claims of the members of the Class, and they are adequate representatives of the Class. Plaintiffs and the members of the Class have sustained damages because of Defendants' unlawful activities alleged herein. Plaintiffs have retained counsel competent and experienced in class and antitrust litigation and intend to prosecute this action vigorously. The interests of the Class will be fairly and adequately protected by Plaintiffs. Plaintiffs' interests are not antagonistic to those of the class members.

10. A class action is superior to other available means for the fair and efficient adjudication of the controversy.

IV

TRADE AND COMMERCE INVOLVED

11. Defendants are engaged in interstate commerce, are in the flow of commerce, and their business activities have a substantial effect on interstate commerce between the states and on foreign commerce. The search and examination of title is an integral part of interstate real estate transactions. Defendants frequently provide these services to citizens of states other than states in which the services are provided. Frequently the Defendants' search and examination services are provided in connection with real estate transactions involving financing or guarantees provided by persons or entities located in states other than the states in which the services are provided.

12. The relevant product market involved in this case is the market for title search and examination services. Title search and examination services identify and describe the ownership of a particular property and all actual or potential rights, claims or interests in the property.

13. Title search and examination services are distinct from settlement services (otherwise known as escrow services) and from the sale of title insurance. Settlement services are services performed in connection with the closing of a real estate transactions, such as supervising the execution, delivery and recording of documents. Title insurance protects real estate owners against losses due to defective title or encumbrances on property.

14. Defendants, as part of their overall marketing strategies, offer title search and examination services, settlement services and title insurance. Title search and examination services frequently are provided by the same Defendant that performs the escrow services and sells the title insurance policy for a given real estate transaction.

Consumers purchase title insurance in virtually every instance in which a purchase of real estate occurs. Most if not all lenders require title insurance as a condition of extending credit in connection with real estate transactions.

V

DEFENDANT'S CONTRACT, COMBINATION OR CONSPIRACY IN RESTRAINT OF TRADE

15. Commencing at some time prior to 1981, the exact date being unknown to Plaintiffs, Defendants entered into a contract, combination or conspiracy to fix, stabilize and maintain at agreed-upon price levels charges for title search and examination services in restraint of interstate trade and commerce in the relevant market in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

16. In furtherance of their contract, combination, or conspiracy, Defendants held meetings and discussions and otherwise exchanged pricing information among themselves and with others for the purpose of setting, fixing and manipulating prices for title search, examination and settlement services.

17. The contract, combination, or conspiracy between and among the Defendants alleged herein unreasonably restrained trade in the relevant market in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

VI

PRIOR GOVERNMENTAL PROCEEDINGS

18. On September 23, 1980, the United States, pursuant to 15 U.S.C. § 4, filed suit to restrain the Defendants from violating Section 1 of the Sherman Act by combining to fix and maintain prices for escrow services in Arizona. On October 21, 1981, the United States District Court for the District of Arizona entered a final judgment in favor of the United States. This final judgment was affirmed on appeal by the Ninth Circuit Court of Appeals on March 7, 1983. Certiorari was denied by the United States Supreme Court on June 11, 1984.

19. On January 7, 1985, the Federal Trade Commission filed a complaint charging that the Defendants, in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45), had restrained competition by agreeing on the prices to be charged for title search and examination and settlement (escrow) services. On September 19, 1989, the Commission entered a Final Order finding that the Defendants illegally combined to fix prices for search and examination services in Arizona, Connecticut, Montana, New Jersey, Pennsylvania, and Wisconsin, by participating in a rating bureau that pooled data on their policies and claims, but dismissed the complaint as it related to settlement or escrow services.

VII

EFFECTS OF VIOLATIONS CHARGED

20. The effects of the violations alleged herein have been that a substantial amount of interstate commerce in the relevant market has been affected and competition has been foreclosed, restrained and lessened. Plaintiffs and the members of the Class have been deprived of competitively determined prices and have been forced to pay prices which have been fixed and maintained by Defendants.

VIII

INJURY AND DAMAGES

21. As a direct and proximate result of the Defendants' unlawful conduct, plaintiffs and members of the Class have sustained substantial damages to their business or property in amounts which are presently undetermined and which cannot be precisely determined without discovery of Defendants' books the records.

22. The unlawful conduct of Defendants alleged herein will continue to cause irreparable injury and continuing damage and loss to plaintiff and members of the Class unless restrained by this Court.

IX

PRAYER FOR RELIEF

WHEREFORE PLAINTIFFS PRAY that the Court grant judgment in favor of themselves and the other members of the Class against Defendants as follows:

1. Determining that this action is a proper class action maintainable under Rule 23 F.R.C.P. on behalf of the Plaintiff Class;

2. Adjudging and decreeing that Defendants have contracted, combined and conspired to restrain trade in violation of Section 1 of the Sherman Act;

3. Awarding Plaintiffs and the other members of the Class treble the amount of their actual damages sustained as a consequence of Defendants' unlawful conduct, as provided by law;

4. Awarding Plaintiffs the costs and disbursements of this action, including reasonable attorneys fees and expert fees;

5. Restraining and enjoining Defendants from continuing to engage in any unlawful contract, combination or conspiracy in interstate commerce; and

6. Granting such other and further relief as may be just and proper.

. . . .
. . . .
. . . .

RESPECTFULLY SUBMITTED this 13 day of April, 1990.

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JURY DEMAND

Plaintiffs demand a trial by jury.

RESPECTFULLY SUBMITTED this 13 day of April, 1990.

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UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 87-1815

IN RE REAL ESTATE TITLE AND SETTLEMENT SERVICES ANTITRUST LITIGATION

APPEAL OF TUCSON UNIFIED SCHOOL DISTRICT AND PHOENIX ELEMENTARY SCHOOL DISTRICT NO. 1

Argued June 8, 1988

Decided March 7, 1989

Rehearing and Rehearing In Banc Denied April 5, 1989

Before BECKER, STAPLETON and GREENBERG, Circuit Judges.

OPINION OF THE COURT

BECKER, Circuit Judge.

This appeal is from an order of the district court for the Eastern District of Pennsylvania enjoining an Arizona state court damages suit by appellants, two Arizona school boards, against appellee title insurance companies for price fixing in violation of Arizona state law. Appellants were members of the plaintiff class in a multi-district class action before the same district court involving federal antitrust claims against the same defendants. These claims were settled, and the settlement was approved by the district court on June 10, 1986.

Prior to the approval of the settlement, the State of Arizona moved to opt out of the class action on behalf of itself and its residents. This motion was denied by the

district court. Arizona appealed to this Court, and, without opinion, we affirmed the district court's decision. The school boards, represented by the Arizona Attorney General, then brought the Arizona state court suit, seeking redress under state antitrust law, based on the same allegedly illegal activity by the same defendants. The title insurance companies asked the district court which heard the original class action to enjoin the Arizona state court suit. The district court found that the earlier class action settlement agreement precluded the state court action and therefore granted the requested injunction.

Noting the absence of minimum contacts with the Pennsylvania forum and their lack of consent to jurisdiction, appellants contend that the district court lacked the power to enjoin their action because it did not have personal jurisdiction over them. Appellants' contention presents a conceptually difficult question, particularly in view of the Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12, 105 S.Ct. 2965, 2974-75, 86 L.Ed.2d 628 (1985). In *Shutts*, the Court held, with respect to damage class actions in which absent plaintiffs are allowed to opt out, that absent plaintiffs can be bound to a class action judgment even when they lack minimum contacts with the forum. We find this case to be distinguishable from *Shutts*, however. The school districts here have lost more than the absent plaintiffs lost in *Shutts*, and yet were given fewer procedural protections. The absent plaintiffs in *Shutts* were still able to challenge the adequacy of class representation in the forum of their choice, whereas the school boards in this case were forced under threat of injunction to address their adequacy claims to the distant Pennsylvania district court. Yet, while the absent plaintiffs in *Shutts* were given the opportunity to opt out of the class action, the school boards in this case were kept in the class action against their wishes.

Although the question is extremely close, we believe that in this situation it would violate due process for the district court to enjoin the school boards, which have not had minimum contacts with the forum nor consented to jurisdiction. We will thus reverse and remand the case with directions that the court vacate the injunction. In reaching this result, we also hold that the school boards did not consent to personal jurisdiction in the injunction proceeding by reason of Arizona's appearance on their behalf in the initial class action to move to opt out, or its appeal from the denial of that motion. That is because we believe that a party does not consent to having the full power of the court levied against it by merely attempting to extricate itself from the court's jurisdiction through an opt out motion.

I.

In January 1985, the Federal Trade Commission filed a complaint against six title insurance companies charging price fixing in thirteen states. Shortly thereafter, private parties in each affected state filed "tag-along" antitrust class action suits seeking injunctive relief and treble damages. These private antitrust suits were consolidated for pre-trial purposes, pursuant to 28 U.S.C. § 1407 (1982), and transferred to the district court for the Eastern District of Pennsylvania, as MDL 633.

In January 1986, the class representatives and the defendant title companies reached a settlement. The settlement was prompted in large part by the Supreme Court's decision in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985). That case held that the federal antitrust laws do not allow recovery if the alleged anti-competitive activity was expressly permitted and actually supervised by a state. *See* 471 U.S. at 59-60, 105 S.Ct. at 1727-28. This expansion of the so-called "state action exception" to the antitrust laws adversely affected the plaintiff class' claims, because, in general, the states

have heavily regulated the business of title insurance. *See* Dist.Ct.Op. at 34-36 (June 10, 1986) [1986 WL 6531].

The attorneys general of five states (Montana, New Jersey, Ohio, Pennsylvania, and Wisconsin) filed motions contending that the representative plaintiffs had not adequately represented them because the settlement did not provide significant monetary relief for their residents. *See id.* at 32. These five states argued that the class representatives ignored the fact that the degree of regulation of the title insurance industry varied from state to state, and thus that the strength of defendants' state action defense could vary from state to state. *See id.* at 17-19. The district court rejected the contentions of the five attorneys general because it found that they had not established that the state action defense would not be applicable to price fixing in their states, and because other defenses could block recovery in their states anyway. *See id.* at 37-40. Arizona did not participate in the objections to the adequacy of representation. Arizona did, however, move to opt out of the class on behalf of itself and its residents. *See id.* at 24.

On June 10, 1986, the district court approved the settlement. In paragraph 3 of the order, the court defined the plaintiff class as:

> All purchasers and insureds who purchased or received title insurance . . . from [the defendants] . . . with respect to real estate located in any of the thirteen Affected States during the period from January 1, 1981 to December 31, 1985 inclusive.

Dist. Ct. Order at 2 (June 10, 1986). Paragraph 8 defined the scope of the settlement in expansive terms:

> all claims that plaintiffs and members of the class may have as against defendants . . . arising under the laws of the United States *or of any state* or other jurisdiction that are based on, relate to or arise out of any allegations [of price fixing] . . . are *dismissed with prejudice.*

Id. at 6 (emphasis added). In paragraph 10 of its order, the district court reserved jurisdiction for purposes of enforcing its order. *See id.* at 7. In the opinion accompanying the order, the district court considered the fairness of the proposed class settlement and the adequacy of the class representation, and found the settlement to be fair and the representation to be adequate.

Prior to approving the settlement, the district court certified the class pursuant to Fed.R.Civ.P. 23(b)(1) and 23(b)(2), types of class actions that do not provide the right to opt out. In support of this ruling, the court found that there was a serious risk that different courts would fashion different and incompatible means of restructuring the title insurance industry, and that the relief provided by the settlement was primarily injunctive. *See* Dist.Ct.Op. at 21-23. The court also denied Arizona's request to opt out on behalf of itself and its residents. The court found no reason to allow opt outs because "[t]he rights of the proposed class are adequately protected by the Rule 23 requirements that the class be adequately represented by the representative plaintiffs and by qualified counsel, that the class receive some adequate form of notice of the proposed settlement and that the court approve the settlement only if it is fair, adequate and reasonable." *Id.* at 25.

Arizona appealed the district court's denial of its motion to opt out to this Court. Arizona argued that: (1) due process required that Arizona and its residents be afforded an opportunity to opt out before their damages claims could be extinguished; (2) the district court erred in failing to certify the action as a Fed.R.Civ.P. 23(b)(3) action, which requires that class members be given the opoprtunity to opt out; and (3) the class received inadequate notice of the settlement and its consequences. Although in its briefs and in oral argument

Arizona discussed its assertion that it retained a valid state antitrust action for damages—the same argument it raises now in its challenge to the adequacy of representation—Arizona did not explicitly challenge the adequacy of the class representation in its prior appeal. This Court affirmed without opinion, thus blessing the district court's denial of Arizona's motion to opt out and its determination that the notice was sufficient, but not stating whether its affirmance was based upon rejection of Arizona's due process claims or on some other ground. *In re Real Estate Title & Settlement Services Antitrust Litigation*, 815 F.2d 695 (3d Cir.1987) (mem.op.), *cert. denied*, —— U.S. ——, 108 S.Ct. 1085, 99 L.Ed. 2d 243 (1988).[1]

On November 3, 1987, while a petition for certiorari to the Supreme Court was pending on the issue of Arizona's right to opt out, the Arizona Attorney General filed a new complaint in Arizona state court seeking damages from the same title insurance companies named in MDL 633 on behalf of the school districts of Tucson and Phoenix. The complaint alleged that the title companies had conspired to fix prices in violation of Arizona's state antitrust laws.

[1] The parties dispute the effect of this Court's prior judgment order on the due process claims that appellants raise in this appeal. The title companies argue that since Arizona raised in the prior appeal essentially the same issue that it raises in this appeal—that it violates due process to foreclose the damage claims of Arizona residents—the Arizona school boards are, because of their close relation to the state of Arizona, barred from relitigating it by principles of issue preclusion. This position, however, is mistaken because issue preclusion only attaches if the basis of the first court's decision is clear. *See Restatement (Second) of Judgments* § 27(g) (1982). In this case, the first panel issued the order without opinion. It is possible that that panel was persuaded by the named plaintiff's argument in opposition to Arizona's appeal, that the Court should not grant relief at that point because Arizona could more properly raise its due process claim on collateral attack. *See* Brief for Plaintiff/Appellees at 39-42, *In re Real Estate Title & Settlement Services Antitrust Litigation*, 815 F.2d 695 (3d Cir. 1987). Unless the title companies can establish that resolution of any of Arizona's due process claims are essential to the first panel's affirmance of the denial of Arizona's motion to opt out, issue preclusion will not bar relitigation of those issues. *See Restatement (Second) of Judgments* § 27 (1982).

In response, the defendant title insurance companies moved the district court in the Eastern District of Pennsylvania to enjoin the Arizona state court suit on the ground that it was prohibited by the class settlement agreement to which the school boards were bound. On November 30, 1987, the district court held a hearing, at which both the school boards and the title insurance companies were represented. Citing its power under an exception to the Anti-Injunction Act to enjoin a state proceeding if that proceeding interferes with the effectuation of a federal judgment, and noting that it had retained jurisdiction over the subject matter, the court enjoined the Arizona school boards from pursuing their state court suit on the ground that the state suit was barred by its approval of the class settlement.

On December 24, 1987, the Arizona Attorney General filed the notice of appeal now before us. The appeal is based on the contentions that: (1) the district court did not have the power to enjoin the school boards, because the school boards did not have minimum contacts with the forum; (2) the district court was without power to determine the res judicata effect of its own judgment; (3) because of interests in comity and federalism, the district court should have abstained from deciding the res judicata issue; and (4) the district court erred in holding that the settlement of the federal court class action bars the Arizona state court suit.[2] Because we

[2] The school boards' fourth contention is based on an argument that they were not adequately represented in the class action. The school boards submit that the representative plaintiffs sold them out by agreeing to a settlement that included no direct monetary relief. They contend that plaintiffs from Arizona would have been able to obtain monetary relief because the Arizona government did

agree with the school boards' first contention—that the school districts could not be enjoined because they did not have minimum contacts with the forum—and will order the district court to vacate the injunction on that ground, we do not address the school boards' other three contentions.

II.

The Arizona school boards argue that, no matter what the preclusive effect of MDL 633, the district court had no power to issue an injunction against them because it possessed no personal jurisdiction over them. The school boards acknowledge that they were encompassed within the plaintiff class in MDL 633. And they do not at this time assert any personal jurisdiction obstacle to binding them to the settlement. Nevertheless, the school boards argue that the district court is without power to enter an injunction against absentee class members who have neither consented to jurisdiction nor have established minimum contacts with the forum.[3]

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not exercise enough supervision over the title insurance industry to make the activity subject to the state action exception to the federal antitrust laws (thus making the reason for the settlement inapplicable to Arizona residents), and because Arizona plaintiffs would have also had a cause of action under Arizona state antitrust law, which does not have a state action exception.

[3] As discussed below, this is a due process claim—the school boards argue that it would violate the Fifth Amendment's guarantee of due process for a federal court to enjoin them when they have not had minimum contacts with the forum. Although the Supreme Court has held that states are not persons within the meaning of the Fifth Amendment and thus are not entitled to due process protections, *see South Carolina v. Katzenbach*, 383 U.S. 301, 323-24, 86 S.Ct. 803, 815-16, 15 L.Ed.2d 769 (1966), we believe that the school boards are persons within the meaning of the Fifth Amendment due process clause. Although they may derive their funding from the state, we think that the school districts, whom the school boards represent, are more like private corporations—which can be persons under the due process clause—than like states. *See United States v. Morton Salt Co.*, 338 U.S. 632, 652, 70 S.Ct. 357, 368, 94 L.Ed. 401 (1950) (holding that although corporations

A.

The Supreme Court has held that a court can bind an absent class member who had the ability to opt out to the judgment in a class action for damages, even if that party did not have minimum contacts with the forum. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). In *Shutts*, more than 28,000 plaintiffs from all over the United States joined in a Kansas (state court) class action to recover interest on delayed royalty payments from Phillips Petroleum.[4] Phillips argued that Kansas' exercise of personal jurisdiction over the absentees violated the due process clause of the Fourteenth Amendment, because it did not meet the due process standard for personal

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do not have a right to privacy that is coextensive with that of individuals, they "may and should" have a right against having unreasonable demands levied on them by the federal government in violation of the due process clause of the Fifth Amendment). Like corporations, and unlike states, the school districts are limited bodies which exist for a particular and circumscribed purpose. School boards are clearly "state actors," but that fact is immaterial; private corporations can also be state actors, *see Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 716, 81 S.Ct. 856, 857, 6 L.Ed.2d 45 (1961) (holding that a private restaurant located in a public garage is a state actor), and, as explained above, they are accorded Fifth Amendment due process protection. We further note that in interpreting the Eleventh Amendment, the Supreme Court has held that school boards, despite their link to the state that created them, do not partake of the state's sovereign immunity. *See Mount Healthy School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-82, 97 S.Ct. 568, 572-74, 50 L.Ed.2d 471 (1977). Thus although school districts are related to the state, the Supreme Court has declared that they are not the alter ego of the state, *see id.*, and thus the Constitution can apply to them differently.

[4] Even though Kansas state law governed the class in *Shutts*, the Kansas law essentially tracked federal law and thus the holding in *Shutts* would apply equally to federal class actions. *See* 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1757 at 90 (2d ed. 1986); *see also* Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions after* Phillips Petroleum Co. v. Shutts, 96 Yale L.J. 1, 29-31 (1986).

jurisdiction required by *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) (requiring minimum contacts for personal jurisdiction). Phillips asserted that because Kansas "had no prelitigation contact with many of the plaintiffs and leases involved . . . Kansas ha[d] exceeded its jurisdictional reach and thereby violated the due process rights of the absent plaintiffs." 472 U.S. at 806, 105 S.Ct. at 2971.[5]

The Court rejected the defendant's challenge, and held that the *International Shoe* minimum contacts standard for personal jurisdiction as applied to *defendants* could not be automatically imported to govern the rights of absent *plaintiffs*. *See Shutts*, 472 U.S. at 808, 105 S.Ct. at 2972. The Court stated that the protection required for an out-of-state defendant, "faced with the full powers of the forum state to render judgment *against* it," *id.*, need not necessarily be afforded to an absent plaintiff. A defendant must finance and participate in a suit, substantial burdens that require the protection of minimum contacts. The class action plaintiff, however, "is in quite a different posture" according to the Court. *Id.* Although an absent plaintiff does risk losing its cause of action, which is a form of property, "[t]he burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant." *Id.*

Shutts stands for the proposition that a court can bind all members of a plaintiff "opt out" class to a judgment for damages even if the class members do not meet the traditional requirements of *in personam* jurisdiction "so long as the named parties adequately represented the absent class and the prosecution of the litigation was within

[5] The Court found that the defendant, Phillips, had standing to raise the claim that the due process rights of the absent plaintiffs were being violated based on Phillips' interest in ensuring that any favorable judgment bind all the absentees. *See Shutts*, 472 U.S. at 805, 105 S.Ct. at 2971.

the common interest." *Id.* The procedural protections of Fed.R.Civ.P. 23 replace the rigid rules of personal jurisdiction in this context and are all that is needed to meet the requirements of due process.[6]

The title companies submit that, although the injunction was issued *against* the Arizona school boards, the school boards more resemble plaintiffs than defendants because all that the school boards have lost is their cause of action. Thus, the companies argue that, under *Shutts*, the district court could enjoin the school boards even though the school boards did not have minimum contacts with Pennsylvania. Although we agree that the school boards seem more like plaintiffs than defendants, we still hold that the district court did not have the power to enjoin them, because, as we will explain, the school boards

[6] Both *International Shoe* and *Shutts* arose in the state court systems; hence the Supreme Court enumerated the necessary procedural protections for defendants and absent class members under the due process clause of the Fourteenth Amendment. Here, in contrast, because we are interpreting the powers of a federal court, the question is whether the due process guarantees of the Fifth Amendment have been satisfied. However, this Court has held that the "minimum contacts" standard articulated in *International Shoe* generally applies to federal courts in federal statutory cases as well as to state courts, *see Fraley v. Chesapeake & Ohio Ry. Co.*, 397 F.2d 1, 3 (3d Cir.1968) (holding that although the minimum contacts principle developed in diversity cases, it is nonetheless "generally regarded as applicable in cases grounded on a federal claim"), at least, it would seem, in cases in which Congress has not spoken to the extent of the reach of the federal court by, for example, providing for nationwide service of process. *Cf. Oxford First Corp. v. PNC Liquidating Corp.*, 372 F.Supp. 191, 203-05 (E.D.Pa.1974) (a federal court's personal jurisdiction over a defendant being sued under a federal statute providing for nationwide service of process should be determined by reference to a fairness test, weighing the following factors: (1) the extent of defendant's contacts with the forum; (2) the inconvenience to a defendant of having to defend in a distant forum; (3) judicial economy; (4) the possible location of discovery proceedings; and (5) whether the activity in question is likely to have impact beyond the borders of defendant's residence or business and the extent of its impact).

have lost more than the absent plaintiffs lost in *Shutts*, and they were accorded fewer procedural protections.

Like the absent plaintiffs in *Shutts*, the Arizona school boards risked losing, and may have lost, their cause of action for damages. *See* 472 U.S. at 807, 105 S.Ct. at 2972. However, as the Court in *Shutts* pointed out, the absent class members in *Shutts* were bound by the class action judgment only if they were adequately represented in the class action proceeding. Indeed, the Supreme Court had previously held that it would violate due process to bind an absent class member to a judgment from a proceeding in which the member was not adequately represented. *See Hansberry v. Lee*, 311 U.S. 32, 42-44, 61 S.Ct. 115, 118-19, 85 L.Ed. 22 (1940). Thus the class members in *Shutts* still possessed their right to attack the class action judgment collaterally, presumably in the forum of their choice, alleging that the representative plaintiff did not represent them adequately.

In the instant case, in contrast, once the appellees moved for an injunction in federal court, the Arizona school boards were forced to come from Arizona to Pennsylvania, a forum with which it is uncontested they lack minimum contacts, and litigate their adequacy of representation claim as a defense in the injunction action there (on pain of losing their state claim entirely if the injunction against them were issued).[7] The fact that *Congress*,

[7] Although the burden may not seem so great in this case, because the school boards have the backing and resources of the State of Arizona behind them and thus presumably can bear the expense of distant litigation, we cannot define due process based on the identity of a particular litigant. We recognize the force of the argument that class action procedures should be evaluated on a pragmatic basis, but pragmatism must yield to constitutional considerations. While it is also true that constitutional adjudication does not take place in a vacuum, we believe that no principled line can be drawn, for example, at governmental bodies. There are many poor school boards who, when forced to litigate abroad, may not have the backing of the state attorney general.

at least in some cases, may force a plaintiff to litigate its claim in a particular forum without violating due process, *see, e.g., Lockerty v. Phillips*, 319 U.S. 182, 187-89, 63 S.Ct. 1019, 1022-23, 87 L.Ed. 1339 (1943) (upholding right of Congress to direct all actions to restrain enforcement of price orders under the Emergency Price Control Act to one Emergency Court of Appeals in Washington, D.C.), is irrelevant to the question whether the school boards may have been deprived of due process by being forced by judicial fiat to litigate their adequacy of representation claim in Pennsylvania district court. The fact that the school boards were forced to litigate their adequacy claim in Pennsylvania was not based on any congressional determination.

Congress's power to direct a plaintiff to a particular federal forum stems from the fact that it is a matter of congressional discretion whether to create the federal courts at all. *Lockerty*, 319 U.S. at 187-89, 63 S.Ct. at 1022-23. Our interpretation of the due process clause of the Fifth Amendment in this context must be informed by the fact that the Constitution itself has given Congress the right to create the lower federal courts as it sees fit. *See* U.S. Const. Art. III, § 1. However, Congress has never evinced a desire as to whether a party lacking minimum contacts with the class action forum in a hybrid suit involving substantial damage claims should nonetheless be forced to bring its collateral challenge in that forum. In the instant case, there is no competing constitutional value (akin to Congress's power to create the federal courts) to cabin our understanding of due process.

We further note in this regard that procedural due process does not protect litigants from any particular outcome; instead it protects litigants from arbitrary denials of rights. In this case, the school boards were haled across the country, not on the basis of a decision by Congress based on investigation and deliberation, but merely because of the fortuity that plaintiffs in Penn-

sylvania had similar claims and the Judicial Panel on Multi-district Litigation elected to consolidate all the MDL 633 cases there. Thus we must look carefully at the protections that the school boards were given in the class action proceeding, to assess whether it would violate due process to force them to litigate their adequacy as part of an injunction action in Pennsylvania district court.

In this regard, we stress that, although the original federal class action was certified under Fed.R.Civ.P. 23(b)(1) and 23(b)(2), it was a hybrid suit that involved the foreclosure of substantial damage claims, as well as the grant of injunctive relief. The Supreme Court has held that a cause of action for damages is a property right, and thus cannot be taken without due process. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 320, 70 S.Ct. 652, 660, 94 L.Ed. 865 (1950). We need not reach the issue of what procedural protections are required before a court can enjoin a suit by a party who was part of a class action for purely equitable relief, as opposed to the type of relief at issue in this case. *Cf.* 1 *Newberg on Class Actions* § 4.14 at 298-300 (1985) (even though certification under 23(b)(2) may be appropriate when damage and injunctive relief are both sought and are both important, courts should adopt safeguards when certifying important damage claims as part of a 23(b)(2) class action—for example by certifying the damage claims separately under 23(b)(3)). We are of course bound by this Court's earlier refusal to reverse the district court for failure to certify a (b)(3) class. However, that decision does not foreclose us from fashioning a rule for a hybrid class with substantial damage claims certified under (b)(1) and (b)(2) that requires procedural protections before an absent class member can be enjoined from relitigation.[8]

[8] Neither do we address the due process requirements in a class action certified under Rule 23(b)(1) in which there is only a limited common fund from which the plaintiffs can obtain relief.

Although, as discussed above, the consequences to the Arizona school boards of allowing the district court to adjudicate the injunction motion against them are more severe than were the consequences to the absent plaintiffs in *Shutts*, the procedural protections afforded the boards in the class action proceeding were fewer than those afforded the *Shutts* absent plaintiffs. In *Shutts*, the Court relied heavily on the fact that class members were given a chance to opt out of the damages class action. *See* 472 U.S. at 810-11, 105 S.Ct. at 2973-74. Two leading commentators have described *Shutts* as follows:

> One way to view *Shutts* is as a case about distant forum abuse. The right to opt out is essential to the Supreme Court's inference of consent, and that reasoning, in turn, is essential to the Court's validation of jurisdiction over members who have no affiliation with a distant forum.

Miller & Crump, *Multistate Class Actions after* Shutts, 96 Yale L.J. at 52. The Arizona school boards, on the other hand, were not afforded the opportunity to opt out of this hybrid class action. Arizona's motion to opt out on behalf of its residents was denied by the district court, and the school boards were kept in the litigation against their wishes. One of the important procedural protections that persuaded the Court in *Shutts* that there was no due process violation in binding absent members to the class action judgment in *Shutts* was thus not available to Arizona in the instant case.

We need not reach the issue, left open by *Shutts*, *see* 472 U.S. at 811 n. 3, 105 S.Ct. at 2974 n. 3, whether an absent plaintiff can be bound to the judgment in a hybrid (damage and injunctive) class action if it was not afforded the opportunity to opt out. The foregoing discussion does not decide that question because an absent plaintiff is not subject to the burdens of distant forum litigation when it is bound to a class action settlement, as long as it can challenge the adequacy of representation

in the forum of its choice. The only issue we address is whether an absent class member can be *enjoined* from relitigation if the member does not have minimum contacts with the forum. And on that issue, we hold that, given that the absent member in this case loses more than the plaintiffs lost in *Shutts*, if the member has not been given the opportunity to opt out in a class action involving both important injunctive relief and damage claims, the member must either have minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court that entertained the class action.[9] Because neither factor is present, the injunction must be set aside.

This does not mean that the settlement of the class action will be of no value to the title companies. The title companies can raise the defense that the Arizona school boards are bound to the settlement of MDL 633, and thus are precluded from proceeding with the state court suit, in the Arizona state court proceeding. The school boards can then raise their contention that they were not adequately represented in the class action proceeding, or raise other arguments as to why it would violate due process to bind them to the class action. *See supra* at 765 n. 2 (outlining Arizona's challenge to adequacy of representation); *see also* 3 *Newberg on Class*

[9] Appellees argue that the instant case is indistinguishable from *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1332 (5th Cir.1981), *cert. denied*, 456 U.S. 936, 102 S.Ct. 1993, 72 L.E.2d 456 (1982). In that case, absentee class members from South Carolina, dissatisfied with their settlement, sued defendants in South Carolina state court on state antitrust claims. The federal district court in Texas that had presided over the settlement enjoined the state court action because such actions were precluded by the federal class settlement. The Court of Appeals upheld the injunction. Appellees argue that if we hold that the district court did not have the power to issue the injunction we would be creating a split between the circuits on the issue. We note, however, that the court in *Corrugated Container* never addressed the issue of the due process implications of lack of personal jurisdiction.

Actions § 16.23 at 342-43 (the two considerations to look to in deciding whether a party is bound by the prior class action are whether the parties were members of the class, and "whether the initial proceeding complied with due process"). It will be for the Arizona court to determine the merits of the due process contentions. If that court finds that the school boards were accorded due process in the class action proceeding, then the state court suit will be prohibited by the terms of the settlement.

B.

Appellees contend that imposing a minimum contacts requirement would wreak havoc on the class action system. They argue that the district court's power to render a judgment against class members would be largely illusory if the court could not enjoin all plaintiffs who seek to attack the judgment collaterally in other fora. They further argue that defendants would have little incentive to settle class actions under such a system because a defendant who successfully settled and hence legally barred further claims from absent class members could nevertheless expect to be sued in multiple other fora.

We do not agree with appellees' dire predictions. Ever since *Hansberry v. Lee* was decided in 1940, collateral attacks have been considered to be a necessary part of the class action scheme. Rather than threatening the vitality of the class action mechanism, the fact that some plaintiffs will be able to extricate themselves from class action judgments if subsequent courts find them to be inadequately represented is integral to the constitutionality of the class action procedure. *See Hansberry*, 311 U.S. at 45, 61 S.Ct. at 120 (stating that it would violate due process to bind an inadequately represented absent party to a prior judgment).

The result we reach is supported by important policy considerations bearing upon the efficiency of the class action device. Were we to adopt the appellees' position,

we would be placing an extraordinary burden on courts which hear large, multistate class actions. There may be cases in which large numbers of absent plaintiffs wish to challenge the adequacy of representation. Under the title companies' rule, defendants would be able to funnel all of these challenges into the class action court by bringing injunction actions. This kind of consolidation would not necessarily be efficient, since it would not be sourced in a judge's belief that efficiency would be furthered by consolidation, but instead would arise as a product of the defendant's litigation strategy. As well as hearing the class action itself, the class action court would also become the repository of all of the potentially numerous and burdensome adequacy challenges.

In order to put the matter in perspective, it is important to emphasize that we are not reaching the question whether it is permissible to enjoin an absent plaintiff from relitigation if the absent plaintiff were afforded an opportunity to opt out of the class action. It may be that, in a hybrid class action that involves important injunctive and damage components, a defendant need only consent to a class certification that allows for opt outs in order to avoid due process challenges to the settlement in multiple fora, as long as the court approves that certification. If this is true, creating a minimum contacts requirement that applies to enjoining a plaintiff who was *not* allowed to opt out of a class action could make it more likely that, as part of the settlement of a hybrid class action, absent plaintiffs will be given an opportunity to opt out, but it is unlikely to discourage defendants from settling class actions in appropriate cases.

Moreover, as the Court explains in *Shutts*, it is partly up to the defendant to safeguard the interest of the absent plaintiffs. *See* 472 U.S. at 810, 105 S.Ct. at 2973. If the defendant wishes to achieve maximum preclusive effect, it is up to the defendant to ensure that the class is appropriately certified, and the absent members are adequately represented. Far from wreaking havoc on the

class action mechanism, we believe that our holding will foster results that most fairly balance the interests of absent class members and defendants alike.

C.

The title companies contend alternatively that by appearing in the district court in Pennsylvania, Arizona consented to jurisdiction by the district court over the school boards. However, we agree with the school boards that Arizona's prior appearances before the district court and this court do not constitute consent to personal jurisdiction.

In its prior appearances, Arizona did not litigate the merits of the settlement agreement, nor did it litigate its adequacy of representation claim; in the district court it only moved to opt out, and before this Court it challenged the propriety of the denial of its motion to opt out, and further whether the notice given to plaintiff class members was adequate. In essence, in his prior appearance the Arizona Attorney General was arguing that it was improper for the district court to exercise its power over Arizona residents. Arizona analogizes its position in the first litigation to that of a defendant who comes to court to contest jurisdiction; such a party does not thereby consent to jurisdiction. *See* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1344 at 523-24 (1969). We are aware of no prior cases allowing such a limited appearance for the purpose of a motion to opt out of a class action, and the question whether to approve such a limited appearance is difficult. But because we think that the interests of fairness and efficiency are better served if an absent plaintiff is not deemed to have consented to jurisdiction merely because it moved to opt out, we agree with Arizona's analogy.

We think that it would be bad policy to adopt appellees' position that whenever a litigant appears before a class action court, it waives any future jurisdictional ob-

jection to the court issuing an injunction against it. Such a rule would be unfair because it could require absent plaintiffs to mount a potentially large-scale attack on adequacy in a distant forum (either in the initial proceeding or as a defense to an injunction action), when all they wanted was simply to request that they not be included in the distant litigation at all. And it would be inefficient because it would likely discourage litigants who wish to opt out from bringing opt-out motions in the district court. This would give the district court less information with which to determine whether the class certification is fair and proper, and thus may make it more likely that the class action judgment will be vulnerable on collateral attack. We therefore hold that a plaintiff does not consent to personal jurisdiction to have an injunction levied against it if it has merely appeared in the district court to make a motion to opt out.

Similarly, we do not believe that Arizona consented to jurisdiction on behalf of the school boards by appealing the denial of its motion to opt out and challenging on appeal the sufficiency of the notice to class members. Since we have held that absent plaintiffs do not consent to jurisdiction by moving to opt out, we think it would make little sense to say that parties consent by appealing the denial of such a motion.

We do not think that the fact that in the first appeal Arizona also challenged the sufficiency of notice alters this analysis. Of course, a party should be deemed to consent to personal jurisdiction if it actually litigates the adequacy of representation issue before the district court, or the underlying merits of the class action, because in such a case the party has shown a willingness to engage in extensive litigation in the forum. However, we do not see Arizona's participation as rising to this level. Arizona argued before this Court in its prior appeal that it had the right to opt out on behalf of all of its residents and that the notice sent to its residents was insufficient. Even if Arizona residents were accorded the right to opt out, that

relief would not amount to much if they did not have sufficient notice and thus could not determine if it was in their interest to opt out. As adequate notice is essential for the right to opt out to be meaningful, Arizona's challenge to the sufficiency of notice was part and parcel of its challenge to the denial of its motion to opt out on behalf of its citizens. We thus conclude that the prior appearances in the district court and here do not constitute consent to personal jurisdiction.

III.

For the foregoing reasons, the district court's order enjoining the Arizona school boards from proceeding with their state antitrust action against the title insurance defendants in MDL 633 will be reversed and the case will be remanded with directions that the district court vacate the injunction. Appellees have moved for sanctions under Fed.R.App.P. 38, on the ground that this appeal is frivolous. In light of the fact that we are ruling in favor of appellants, the motion for sanctions will be denied.

Supreme Court, U.S.
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No. 92-1988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TICOR TITLE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

WALTER THOMAS BROWN and JEFFREY L. DZIEWIT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether a federal court may refuse to enforce the judgment in a nationwide class action certified under Rule 23(b)(1) and (b)(2) on the ground that unnamed class members have a constitutional right to opt out of any class action asserting monetary claims.

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United States v. International Bhd. of Teamsters, 708 F. Supp. 1388 (S.D.N.Y. 1989)	13

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Fed .R. Civ. P. 23	*passim*
Other Authorities	
L. Brilmayer & C. Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv. L. Rev. 1217 (1992)	15
Z. Chafee, *Bills of Peace with Multiple Parties*, 45 Harv. L. Rev. 1297 (1932)	20
Z. Chafee, *Some Problems of Equity* (U. Mich. L. 1950)	20, 29
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Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975)	28
3B J. Moore, et al., *Moore's Federal Practice* (2d ed. 1993)	29
Restatement (Second) of Judgments (1980)	25
S. Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323 (1983)	22
7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* (1986)	19, 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1988

TICOR TITLE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

WALTER THOMAS BROWN and JEFFREY L. DZIEWIT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 982 F.2d 386. The opinion of the district court (Pet. App. 17a-30a) is not reported.

The decisions approving and affirming the prior class action judgment (Pet. App. 31a-77a, 78a, 79a) are reported at *In re Real Estate Title and Settlement Services Antitrust Litigation*, 1986-1 Trade Cas. (CCH) ¶ 67,149 (E.D. Pa. 1986), *affirmed without opinion*, 815 F.2d 695 (3d Cir. 1987), *cert. denied*, 485 U.S. 909 (1988).

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1992. A timely petition for rehearing was denied on March 17, 1993. The petition for certiorari

was filed on June 15, 1993, and granted on October 4, 1993. This Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE

The decision of the court of appeals refusing to honor the prior class action judgment was based on the due process clause of the Fifth Amendment to the United States Constitution, which states: "No person shall be . . . deprived of life, liberty or property, without due process of law."

The certification and settlement of the prior class action was carried out pursuant to Rule 23 of the Federal Rules of Civil Procedure, which is reprinted at Pet. App. 80a-82a.

STATEMENT

This case presents the question whether unnamed plaintiff class members have a right to opt out of a federal court class action certified under Rule 23(b)(1) and (b)(2) of the Federal Rules of Civil Procedure whenever claims for monetary relief are involved. The Ninth Circuit held that, although the Rule does not provide such a right, the due process clause of the Fifth Amendment does. On that basis, the court concluded that respondents were not bound by the judgment in a prior class action even though they were members of the settlement class in that case.

1. *The Prior Judgment.* On June 10, 1986, the United States District Court for the Eastern District of Pennsylvania entered a final judgment in the multidistrict antitrust litigation known as *In re Real Estate Title and Settlement Services Antitrust Litigation*, MDL No. 633. The judgment settled twelve separate antitrust class action lawsuits that had been filed in five different federal district courts and consolidated for pretrial proceedings pursuant to the multidistrict litigation statute, 28 U.S.C.

§ 1407.[1] The complaints in the twelve cases all sought injunctive relief and damages, charging that the petitioners in this case, six title insurance companies,[2] had conspired to fix the prices of title insurance services through their participation in state-licensed rating bureaus in thirteen states.

Under the terms of the settlement, the members of the MDL 633 class—more than 3.4 million people who had purchased title insurance over a five-year period (Pet. App. 43a)[3]—received several benefits from the defendant title insurers. These benefits included enhanced title insurance coverage for class members who were current policyholders, reduced rates on newly issued policies for class members who were not current policyholders, and undertakings by the defendants not to engage in the challenged conduct for a specified period. *Id.* at 74a-76a. In exchange, the class members released all federal and state law claims arising from any allegations that the defendants had agreed or conspired to fix the price of title insurance. *Id.* at 76a-77a.

Pursuant to Rule 23(d), the district court ordered that notice of the proposed settlement and of a hearing to en-

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[1] In addition to the Eastern District of Pennsylvania, actions had been filed in the Middle District of Pennsylvania, the Southern District of New York, the Central District of California, and the District of Oregon. Pet. App. 31a.

[2] Petitioner Stewart Title Guaranty Company's Rule 29.1 statement is set forth at Pet. App. 83a-84a. The other petitioners have no parents or subsidiaries within the Rule.

[3] The class was defined as:

> All purchasers and insureds who purchased or received title insurance, including search and examination and/or settlement services, from any title insurance underwriter (whether or not a defendant herein) or any agent of such underwriter with respect to real estate located in any of the thirteen Affected States during the period from January 1, 1981 to December 31, 1985 inclusive.

Pet. App. 37.

tertain class member objections to it be published on two occasions in thirty-six newspapers, having an aggregate circulation of more than 6 million in the thirteen affected states. *Id.* at 41a n.4. Hundreds of individuals requested further information about the settlement, and several filed written objections with the court. *Id.* at 41a-42a. In addition, the Attorneys General of Montana, New Jersey, Ohio, Pennsylvania, and Wisconsin collectively filed an objection, both as purchasers of title insurance and purportedly as *parens patriae* for their residents. *Id.* at 42a. The State of Arizona (also on its own behalf and as *parens patriae*) asserted a right to opt out of the case. *Ibid.*

After a hearing, the district court approved the settlement. The court first ruled that the case was appropriate for class action treatment. It analyzed each of the four "prerequisites" to class certification set forth in Rule 23(a) —numerosity, typicality, commonality, and adequacy of representation—and concluded that they were satisfied. Pet. App. at 43a-47a. The court emphasized that "[t]he primary legal issues in this case are whether plaintiffs' antitrust claims are barred by the state action defense, the McCarran-Ferguson Act and the filed tariff doctrine; or conversely, whether joint filing of rates by the defendant-competitors through rating bureaus as approved by state law, violates the prohibition against price-fixing combinations under the federal antitrust laws." *Id.* at 44a.

The court further ruled that the class should be certified under sections (b)(1)(A) and (b)(2) of Rule 23. Pet. App. 47a-50a. It found that (b)(1)(A) was appropriate because there is "a serious risk that courts in separate actions could impose inconsistent obligations on the defendants [with respect to their rating bureau activities]." Pet. App. 48a. And it found that the requirements of section (b)(2) were satisfied because plaintiffs had challenged "defendants' rating bureau activities; activities which are generally applicable to the proposed class" and

therefore injunctive relief, if awarded, would apply to "the class as a whole." Pet. App. 49a.

Next, the district court rejected Arizona's claim that it had a right to opt out of the settlement, concluding that Rule 23 did not provide such a right in (b)(1) and (b)(2) cases and that the due process rights of class members were "adequately protected by the Rule 23 requirements that the class be adequately represented by the representative plaintiffs and by qualified counsel, that the class receive some adequate form of notice of the proposed settlement and that the court approve the settlement only if it is fair, adequate and reasonable." *Id.* at 51a. The court also refused to grant opt out rights as a matter of discretion on the ground that the provision of such rights would undo the settlement and thus "go against the strong public policy in favor of settlement of class actions." *Id.* at 51a-52a.[4]

The State of Arizona appealed to the Third Circuit, arguing that, because the settlement had resolved monetary claims, the due process clause, as interpreted in *Phillips Petroleum Co. v. Shutts ("Shutts")*, 472 U.S. 797 (1985), required that unnamed class members be allowed to opt out. The court of appeals affirmed without opinion. *In re Real Estate Title & Settlement Serv. Antitrust Litig.*, 815 F.2d 695 (3d Cir. 1987) (Pet. App. 78a). Arizona then unsuccessfully sought review in this Court, raising the same due process argument under *Shutts*. *Arizona v. Chicago Title Ins. Co.*, 485 U.S. 909 (1988) (Pet. App. 79a).

2. *The Proceedings Below.* The present case is one of three that have been brought as collateral attacks on

[4] The court went on to approve the settlement, finding that it was "fair, adequate, and reasonable" under the nine-factor test set out in *Girsh v. Jepson*, 521 F.2d 153, 156-57 (3d Cir. 1975). Pet. App. 53a-72a.

the judgment in MDL 633.[5] The complaint was filed in April 1990 in the United States District Court for Arizona, seeking injunctive relief and damages from the same six title insurers who were the defendants in MDL 633. The claims were brought by one plaintiff from Arizona and one from Wisconsin (two of the thirteen states at issue in MDL 633) on behalf of an alleged class of purchasers of title insurance services in those states. As in MDL 633, the plaintiffs asserted that the defendants had conspired to fix prices for such services in violation of the federal antitrust laws.

The defendants moved for summary judgment on the ground that the judgment in MDL 633 was binding on the plaintiffs under the doctrine of *res judicata*. The district court granted the motion, holding that plaintiffs were within the class in MDL 633, that they had been ade-

[5] At the same time that it was actively pursuing its appeal, the State of Arizona filed a state court suit on behalf of Arizona purchasers of title insurance, asserting state antitrust claims against the same defendants arising from the same conduct at issue in MDL 633. The title insurers moved in the MDL 633 court to enjoin the prosecution of this state court suit on *res judicata* grounds, but the Third Circuit, reversing the district court, held that the *res judicata* effect of the MDL 633 judgment should be raised as a defense in the state court. *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760 (3d Cir.), *cert. denied* 493 U.S. 821 (1989) (J.A. 13-33). The title insurers later sought and obtained dismissal of the state case on *res judicata* and substantive state law grounds; the state court dismissal was affirmed on appeal on substantive grounds without reaching the *res judicata* issue. *Tucson Unified School Dist. v. Chicago Title Ins. Co.*, 804 P.2d 843 (Ariz. Ct. App. 1991).

A second state court suit filed in Wisconsin, asserting state antitrust claims on behalf of Wisconsin title insurance purchasers against the MDL 633 defendants and other title insurers, was dismissed in the trial court on *res judicata* and substantive grounds. *Prentice v. Title Ins. Co.*, No. 89-CV-012004 (Circuit Ct., Milwaukee Cty.). The Wisconsin Supreme Court affirmed the trial court's dismissal on substantive grounds without reaching the *res judicata* issue. *Prentice v. Title Ins. Co.*, 500 N.W.2d 658 (Wis. Ct. App. 1993).

quately represented in that case, and that the judgment did not violate due process. Pet. App. 20a-28a. The court specifically rejected plaintiffs' claim, relying on *Shutts*, that "the MDL 633 court did not have personal jurisdiction over Arizona and Wisconsin residents," and that therefore they had to "be permitted to opt-out before being bound by the MDL 633 class." *Id.* at 26a. The court ruled that *Shutts* was distinguishable because it "is limited to claims for money damages," while the settlement in MDL 633 provided "equitable relief." *Id.* at 27a.[6]

The Ninth Circuit reversed. Although it agreed with the district court that the plaintiff class in MDL 633 (including those members pursuing this action) had been adequately represented by the named plaintiffs and their counsel in that case (*id.* at 8a-11a), and although it did not question the adequacy of the notice and opportunity to object in MDL 633 or the certification of the case under Rule 23(b)(1) and (2), the court of appeals nonetheless ruled that the judgment in MDL 633 was not binding with respect to the class members' damages claims. The court read *Shutts* to require that class members be given a due process right to opt out of a class action "if monetary claims are involved." *Id.* at 12a (citing 472 U.S. at 812).[7] It then characterized MDL 633 as a

[6] The court also concluded that, even if *Shutts* applied, procedural due process was satisfied because "[g]iven the complexity of the MDL 633 litigation, notice of the settlement by publication and the opportunity to object" were sufficient. *Id.* at 27a-28a.

[7] Although the court's opinion is unclear, it appears that the Ninth Circuit intended to limit this due process right to unnamed class members who lack minimum contacts with the State in which the federal court conducting the class action sits. Respondents and the district court both had framed the issue in such jurisdictional terms. *See* note 9, *infra*. And early in its opinion, the Ninth Circuit, while describing a Third Circuit case refusing to enjoin a collateral challenge to MDL 633, observed that the court had held that, absent opt out rights, "the class member must have either 'minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court that entertained the

" 'hybrid suit that involved the *foreclosure of substantial damages claims*' " (*id.* at 12a (quoting *In re Real Estate*, 869 F.2d at 768) (emphasis added by Ninth Circuit)), and concluded that the plaintiffs in this case could relitigate the damages claims at issue in MDL 633 but that they were bound by the injunctive relief provided in that case.[8]

SUMMARY OF ARGUMENT

The due process clause does not require a federal court to provide opt out rights in a nationwide class action involving monetary claims under Rule 23(b)(1) or (b)(2) of the Federal Rules of Civil Procedure. The Constitution allows a federal court to assert jurisdiction over out-of-state class members; and fundamental fairness for all unnamed class members (in-staters and out-of-staters) is assured by requiring that their interests must have been adequately represented by the named plaintiffs before they can be bound by the class action judgment.

1. Federal courts need not provide opt out rights in order to assert jurisdiction over out-of-state class members. The due process clause does not restrict the jurisdiction of federal courts to parties having minimum contacts with the forum state, but allows instead for assertions of federal court jurisdiction on a nationwide basis. *See, e.g.,*

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class action.'" Pet. App. at 4a (quoting *In re Real Estate*, 869 F.2d at 769). Nevertheless, when it came to its legal discussion and the statement of its holding, the Ninth Circuit made no reference to jurisdictional limits, thus raising the possibility that it meant to rule more broadly and require opt out rights for all unnamed class members, in-staters as well as out-of-staters.

[8] The court of appeals also rejected two merits contentions advanced by petitioners in support of summary judgment. It found that respondents' state-action defense to the antitrust claims was unavailing (*id.* at 8a-9a) and that the filed rate doctrine (*see Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922)) was inapplicable on the facts presented (*id.* at 15a-16a). This Court denied certiorari on these issues.

United States v. Union Pac. R.R., 98 U.S. 569, 604 (1878). Rule 23, in turn, permits the federal courts to employ the full extent of that power in certifying nationwide class actions pursuant to its provisions. *See Califano v. Yamasaki*, 442 U.S. 682, 701-03 (1979).

Contrary to the Ninth Circuit's view, this Court's decision in *Shutts* does not require a different conclusion. *Shutts* involved a state court class action, and the jurisdictional power of state courts *is* limited to parties having minimum contacts with the forum state. In view of that due process restriction, an opt out right is required in a state court class action as a means of securing *consent* to jurisdiction by out-of-state class members. *Shutts*, 472 U.S. at 812-13. Because federal courts do not need consent to assert jurisdiction over such out-of-staters, they do not need to provide them opt out rights.

2. The more general due process right to "fundamental fairness" likewise is not violated by the failure to provide opt out rights in a Rule 23(b)(1) or (b)(2) class action involving monetary claims. It is well-settled that class actions are "an exception to the general rule [on claim preclusion]"; when properly conducted, they can bind a person who, "although not a party, has his interests represented by someone who is a party." *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989); *see Hansberry v. Lee*, 311 U.S. 32 (1940). In accord with this recognition, Rule 23 plainly authorizes mandatory class actions under sections (b)(1) and (b)(2) that include claims for monetary relief, and this Court and the lower federal courts repeatedly have upheld such class actions. *See, e.g., Califano v. Yamasaki, supra* (social security benefits). Indeed, the practice goes back well over a hundred years to this Court's first class action decision, which affirmed the judgment in a case involving mandatory classwide adjudication of monetary claims. *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1854).

The constitutional validity of mandatory class actions that include damages claims is also confirmed by a straightforward application of the three-factor balancing test used by the Court for assessing due process claims. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). As for the first factor—the individual interest at stake—an unnamed plaintiff's desire to opt out is not entitled to much weight because the individual's ability to direct and control complex litigation is realistically quite limited. In any event, there is certainly nothing about the ability to control the litigation of a monetary claim that would support a sensible constitutional distinction between it and an injunctive claim, as the Ninth Circuit held. Quite obviously, both in terms of ultimate importance and in terms of dollar value, a claim for injunctive relief can be every bit as significant as a claim for monetary relief.

The second *Mathews* factor—the likelihood that the claimed procedural right will decrease the risk of an erroneous deprivation of property (here, the plaintiffs' claim for damages)—adds no weight to respondents' side of the balance. The touchstone of due process in class actions is the assurance that unnamed class members have been adequately represented before they can be bound. *Hansberry*, 311 U.S. at 44-46. That assurance is pervasively protected, first by the procedures of Rule 23, and second by the fact that unnamed class members are entitled to an individualized determination of adequacy (in a separate proceeding). In these circumstances, the right of individual control over litigation does not enhance the likelihood that the unnamed plaintiff's claim will be accurately resolved.

Finally, the third *Mathews* factor—the interests arrayed against the individual's claim to be able to opt out—are substantial. A mandatory class action eliminates repeated, duplicative litigation that is sure to be inefficient and likely to lead to unfair, inconsistent results.

Such a class action also significantly increases the likelihood of settlement by enabling the defendant to resolve a set of common claims once and for all, thus benefiting the court, the defendant, and, significantly, unnamed class members who do not want to opt out but would rather have their claims decided in the class action.

A fair balance of these factors demonstrates that the individual interest in separately litigating monetary claims is too weak to outweigh the competing interests in systemic efficiency and fairness. Due process, therefore, does not require an opt out right in class actions presenting a claim for monetary relief.

ARGUMENT

The Ninth Circuit incorrectly held that respondents were not fully bound by the judgment in MDL 633 because they were denied due process by the court's failure to allow them to opt out and separately try their damages claims. The due process clause (of the Fifth as well as the Fourteenth Amendment) imposes two kinds of limitations on judicial proceedings: one as to jurisdictional power (can the court compel submission to its authority); and the other as to procedural fairness (do the tribunal's processes provide an acceptable means for adjudicating disputes). Neither constitutional limitation is transgressed by a mandatory federal class action like the one in MDL 633.[9]

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[9] As indicated above (*see* note 7, *supra*), although the Ninth Circuit appears to have based its decision on the jurisdictional dimension of due process, its opinion is not entirely clear on the issue. As for respondents, they rested their due process argument below on the assertion that *Shutts* applied to "an absent plaintiff from outside the forum state." C.A. Br. of Appellants at 25; *see also* Pet. App. 26a ("Plaintiffs . . . argue that due process was violated because the MDL 633 court did not have personal jurisdiction over Arizona and Wisconsin residents") (district court opinion). In their opposition to certiorari, however, respondents

I. A FEDERAL COURT HAS THE JURISDICTIONAL POWER TO RESOLVE THE CLAIMS OF CLASS MEMBERS THROUGHOUT THE UNITED STATES WITHOUT PROVIDING A RIGHT TO OPT OUT.

The basic constitutional principles governing jurisdiction over parties are well-established: within its jurisdictional reach, a court can compel a party to participate in its processes and be bound by its judgments; but outside that reach, a court can act only if the party agrees to subject itself to the court's authority. *See, e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 703-04 (1982); *Pennoyer v. Neff,* 95 U.S. 714, 724-26 (1877). The key to this case, we submit, is that those principles apply differently to state and federal courts, because the due process clause imposes different limits on their respective jurisdictional powers. State courts only can assert jurisdiction over parties having minimum contacts with the state. *See, e.g., International Shoe Co. v. Washington,* 326 U.S. 310 (1945). But the Constitution allows federal courts to exercise adjudicatory power at least with respect to all persons and property located in the United States. This core distinction simultaneously explains why the Court in *Shutts* insisted on an opt out right in a nationwide *state* court class action and why such a right is unnecessary in a *federal* court class action: the former requires the consent of out-of-state class members to decide their claims, whereas the latter does not.

1. It is well-established that the Constitution does not limit the jurisdiction of the federal courts over parties located in the United States and, therefore, Congress may provide that any federal court "shall, by process served anywhere in the United States, have the power to bring

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changed course, contending that "*Shutts* did not distinguish between absent *resident* class members and absent *non-resident* class members; the distinction was between absent *plaintiffs* and absent *defendants.*" Opp. at 8.

before it all the parties necessary to its decision." *United States v. Union Pac. R.R.,* 98 U.S. 569, 604 (1878). This Court recognized that basic proposition early in our history. *See Toland v. Sprague,* 37 U.S. (12 Pet.) 300, 328 (1838); *see also Picquet v. Swan,* 19 F. Cas. 609 (C.C.D. Mass. 1828) (No. 11,134) (Story, J., sitting by designation); *Ex parte Graham,* 10 F. Cas. 911 (C.C.E.D. Pa. 1818) (No. 5,657) (Washington, J., sitting by designation). And it has reiterated the point on several occasions since. *See Robertson v. Railroad Labor Bd.,* 268 U.S. 619, 622 (1925); *Mississippi Publishing Corp. v. Murphree,* 326 U.S. 438, 442 (1946).

Based on this well-settled dictum, the lower federal courts consistently have rejected due process challenges to the numerous federal statutes that authorize nationwide jurisdiction. *See, e.g., Semegen v. Weidner,* 780 F.2d 727, 730 (9th Cir. 1985) (federal securities laws); *FSLIC v. Provo Excelsior Ltd.,* 664 F. Supp. 1405, 1421-22 (D. Utah 1987) (same); *United States v. International Bhd. of Teamsters,* 708 F. Supp. 1388, 1402-03 (S.D.N.Y. 1989) (RICO); *Entek Corp. v. Southwest Pipe & Supply Co.,* 683 F. Supp. 1092, 1096 n.4, 1100 (N.D. Tex. 1988) (antitrust); *Hetchkop v. George Harms Excavating Corp.,* No. 92 Civ. 2239 (JFK), 1993 U.S. Dist. LEXIS 3637 (S.D.N.Y. 1993) (ERISA); *Waste Management, Inc. v. Uniroyal, Inc.,* No. 91-C-1020-S, 1992 U.S. Dist. LEXIS 12003 (W.D. Wis. 1992) (CERCLA); *In re WWG Indus., Inc.,* 44 B.R. 287, 290 (N.D. Ga. 1984) (bankruptcy); *Max Daetwyler Corp. v. R. Meyer,* 762 F.2d 290, 294 n.3 (3d Cir.), *cert. denied,* 474 U.S. 980 (1985) (interpleader); *In re Agent Orange Product Liab. Litig.,* 818 F.2d 145, 163 (2d Cir. 1987), *cert. denied,* 484 U.S. 1004 (1988) (multidistrict transfers).

This uniform body of precedent reflects the essential constitutional recognition that a sovereign must be able to extend the jurisdictional reach of its courts, at the very

least, to people who live within its borders. Indeed, that much was established before, and reaffirmed in, this Court's first due process case involving state court jurisdiction, *Pennoyer v. Neff*, 95 U.S. 714 (1877). As the Court there explained, " '[w]here a party is within a territory, he may justly be subjected to its process and bound personally by the judgment pronounced on such process against him.' " *Id.* at 724 (quoting *Picquet v. Swan*, 5 Mass. 35 [19 F. Cas. 609 (1828)] (Story, J.); *see also McDonald v. Mabee*, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction is physical power.").

The conclusion that federal court jurisdiction can extend nationwide is in no way undermined by the fact that there are federal district courts located in every state. That is a matter of convenience, not constitutional significance. Under Article III, Congress plainly could choose to establish a single federal district court with nationwide jurisdiction. *See Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (Emergency Court of Appeals with nationwide jurisdiction upheld on ground that "Article III left Congress free to establish inferior federal courts or not as it thought appropriate"). And, of course, the Constitution confers national jurisdiction on this Court, both original and appellate, further suggesting that such power could be given to the lower federal courts without offending due process. *See also Union Pacific*, 98 U.S. at 603 (Congress has provided that "[t]he jurisdiction of the Supreme Court and the Court of Claims is not confined by geographical boundaries").

Nor is it relevant to the present case that recent decisions involving the application of the "minimum contacts" rule in the context of state court jurisdiction have emphasized that the test should be applied with an eye toward "protect[ing] the defendant against the burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-

92 (1980); *see also Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. at 702-03 & n.10. That consideration affects only the permissible limits on extensions of jurisdictional power *beyond* the people who live within a jurisdiction's borders: it is absolutely clear, for example, that Alaska (like Delaware) can require its residents to litigate in any court statewide, no matter how inconvenient. *Cf. Burlington N. R.R. v. Ford*, 112 S. Ct. 2184 (1992) (corporation with headquarters in one county of Montana subject to jurisdiction anywhere in the state). By the same token, such considerations of convenience, if relevant at all to the federal courts, can be brought to bear on assertions of jurisdictional power only *outside* the United States. *See Omni Capital Int'l, Inc. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987) (leaving open question whether a foreign defendant's "contacts with the Nation as a whole" provides a constitutional basis for jurisdiction); L. Brilmayer & C. Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv. L. Rev. 1217 (1992) (emphasizing importance of foreign policy concerns to this analysis). Those extra-territorial issues are not raised by this case.

2. The constitutional conclusion that federal courts have nationwide jurisdictional power is sometimes obscured by the fact that such power generally is not used because Rule 4(e), Fed. R. Civ. P., states that, unless Congress provides otherwise, service of process is limited by the applicable "statute or rule of court of the state in which the district court is held." *See also* cases cited at p. 13, *supra* (noting territorial scope of federal court power while holding that Congress had not authorized its full use). That self-imposed, non-constitutional limit on service of process typically restricts which *defendants* can be brought into a case (except in the circumstances, cited at p. 13, *supra*, where Congress, with increasing frequency, has allowed nationwide service). But Rule 4(e)

has no application to the appropriate scope of plaintiff class actions, which are governed by a different Federal Rule, Rule 23.[10]

That Rule imposes no restrictions on the jurisdictional reach of the federal courts, and there is thus no reason to suppose that anything but full constitutional authority is available in certifying class actions under the Rule. This Court has already recognized as much: "Nothing in Rule 23 . . . limits the geographical scope of a class action that is brought in conformity with that Rule. . . . [Consequently,] certification of a nationwide class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court." *Califano v. Yamasaki,* 442 U.S. 682, 702 (1979). And the lower federal courts have frequently invoked this discretion, certifying numerous national and multi-state class actions under all three subcategories ((b)(1), (b)(2), and (b)(3)) of Rule 23. *See, e.g., In re Drexel Burham Lambert Group,* 960 F.2d 285 (2d Cir. 1992), *cert. dismissed,* 113 S. Ct. 1070 (1993); *Lynch v. Rank,* 604 F. Supp. 30, 38-39 (N.D. Cal.), *aff'd,* 747 F.2d 528 (9th Cir. 1984), *modified on other grounds,* 763 F.2d 1098 (9th Cir. 1985); *Mertz v. Harris,* 497 F. Supp. 1134, 1138 (S.D. Tex. 1980); *Dale Elecs., Inc. v. R.C.L. Elecs., Inc.,* 53 F.R.D. 531, 534 (D.N.H. 1971).[11]

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[10] It is worth noting here that Congress has provided nationwide service of process with respect to corporate defendants in antitrust cases. 15 U.S.C. § 22. This provision further suggests that Congress did not want to curtail the jurisdictional reach of the federal courts with respect to plaintiff class members raising antitrust claims like those at issue in MDL 633.

[11] There is an additional legal basis that independently supports the exercise of nationwide jurisdiction over unnamed class members in MDL 633. That case was consolidated pursuant to the multidistrict litigation statute, 28 U.S.C. § 1407(f), which authorizes the entry of final judgment, prior to trial, on the basis of settlement (as occurred here) as well as on grounds of dismissal or summary judgment. *See* Rule 14, Rules of Procedure of the Judicial Panel on Multidistrict Litigation; 28 U.S.C. § 1407(f). *See also In re Donald J. Trump Casino Sec. Litig.,* No. 92-5350, 1993 U.S. App. LEXIS 26691, at *15-17 (3d Cir. 1993). The multidistrict statute is self-evidently nationwide in its coverage and, therefore, it provides explicit congressional authorization for the MDL 633 court to have exercised its full jurisdictional power by entering a binding nationwide settlement. *See In re Agent Orange Product Liab. Litig.,* 818 F.2d at 163 (jurisdiction over nationwide class proper because 28 U.S.C. § 1407 " 'provide[s] for service of process anywhere in the United States' ") (quoting *Mississippi Publishing Corp.,* 326 U.S. at 442); *see also In re FMC Corp. Patent Litig.,* 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) (citing cases).

3. These fundamental principles of jurisdictional power demonstrate why the Ninth Circuit's reflexive application of the *Shutts* opt out requirement to federal court class actions like this one was mistaken. *Shutts* involved a state court class action that sought to adjudicate the claims of out-of-state plaintiffs who had no minimum contacts with the forum State. The only way a state court can constitutionally adjudicate such claims is with the consent of the out-of-state plaintiffs. *See, e.g., International Shoe Co. v. Washington,* 326 U.S. 310 (1945). Accordingly, the Court in *Shutts* expressly defined the "essential question" in the case as "how stringent the requirement for a showing of consent will be." 472 U.S. at 812. The Court then concluded that an opt out provision is stringent enough to establish consent, reasoning that "the Constitution does not require more to protect what must be the somewhat rare species of class member who is unwilling to execute an 'opt out' form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so." *Id.* at 813. *See In re Drexel Burnham Lambert Group, Inc.,* 960 F.2d at 292 ("*Shutts* mandates that a plaintiff be permitted to opt out of a proposed class when the court does not have personal jurisdiction over the plaintiff") (citing 472 U.S. at 811-12).

The *Shutts* analysis is simply irrelevant to a federal class action. Because the Constitution does not disable a federal court from compelling anyone in the country to submit to its jurisdiction under Rule 23, the court has no need to secure consent from any such person before it can adjudicate his or her claim. It follows that there is no constitutional basis for requiring an opt out right designed to provide such consent. The Ninth Circuit's contrary conclusion was incorrect.

II. THE DUE PROCESS CLAUSE DOES NOT REQUIRE THAT UNNAMED CLASS MEMBERS WHO ARE WITHIN A COURT'S JURISDICTIONAL REACH BE GIVEN A RIGHT TO OPT OUT IN CASES INVOLVING A CLAIM FOR MONETARY RELIEF.

Once a court establishes its jurisdictional power over a litigant, the due process clause then requires that the procedures it uses for adjudicating his or her claim "ensure 'fundamental fairness.'" *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985). This aspect of due process likewise is not violated by the failure to provide opt out rights in a properly certified class action. Class actions provide a fair and efficient way to adjudicate numerous essentially identical claims. Their constitutional legitimacy—in cases involving monetary as well as injunctive relief—turns on an assurance that the named plaintiffs have adequately represented the interests of unnamed class members, and not on the consent of each individual class member, expressed through the failure to exercise an opt out right.

1. The Ninth Circuit's holding that due process requires an opt out right in class actions involving monetary claims upsets a well-established and widely-used practice. Rule 23(b)(1) and (b)(2) specifically do not provide such a right, and yet it is clear that both sections intend to cover monetary claims. As for section (b)(1), the

Advisory Committee expressly stated that it applies, *inter alia*, to "claims . . . made by numerous persons against a fund insufficient to satisfy all claims." Rule 23, Adv. Comm. Notes Subdivision (b)(1), Clause B. Similarly, monetary claims may also be entertained under section (b)(2), so long as the injunctive claims are "predominant[]." *Id.* at Subdivision (b)(2). Consistent with these expressed intentions, this Court and the lower federal courts have frequently upheld mandatory class actions that included monetary claims. *See, e.g., Califano v. Yamasaki, supra* (social security benefits under (b)(2)). *See also* 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 1773-74, at 427-47 (1986) (citing numerous (b)(1) class actions involving monetary claims); *id.* § 1775, at 466 n.24 (citing numerous (b)(2) cases involving monetary claims).

These well-established practices reflect the fact, recognized almost from the beginnings of our Republic, that class actions are an "exception to the general rule [of *res judicata*]," which normally requires that an individual be a party to a lawsuit before he or she can be bound by its judgment. *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989) ("a person, although not a party, has his interests adequately represented by someone with the same interests who is a party"). Thus, well over a hundred years ago the Court ruled—in a case involving monetary claims against a church by secessionist ministers—that "[w]here the parties are very numerous, and though they have or may have separate and distinct interests, yet it is impractical to bring them all before the court . . . [t]he decree [in a class action] binds all of them the same as if all of them were before the court." *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302-03 (1854) (citing J. Story, *Equity Pleadings*). Nor was this principle limited to injunctive claims, as the *Smith* case itself illustrates. On the contrary, class actions "involving money claims were adjudicated in equity as a matter of course from early

times." Z. Chafee, *Some Problems of Equity* 285 (U. Mich. L. 1950).[12]

The Court has reaffirmed these basic principles on numerous occasions, without ever suggesting (except in the jurisdictional context of *Shutts*) that opt out rights must be provided in order to bind unnamed plaintiffs by the judgment in a properly conducted class action. To the contrary, the Court has flatly stated that, "[i]f the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree, when rendered, *must bind all of the class properly represented.*" *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 367 (1921) (emphasis added). *See also Cooper v. Federal Reserve Bank*, 467 U.S. 867, 874 (1984); *Hansberry v. Lee*, 311 U.S. 32 (1940); *Sovereign Camp of Woodmen of the World v. Bolin*, 305 U.S. 66 (1938); *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146 (1917); *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915); *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531 (1915).

Given this history, it is hardly surprising that, prior to the Ninth Circuit's misapplication of the jurisdictional holding in *Shutts*, the lower federal courts consistently had rejected the contention that due process requires an

[12] Because class actions were developed in the equity courts, they were not used in legal damages actions when the distinction between the two systems was rigidly observed. Nevertheless, more than sixty years ago Professor Chafee was able to observe that while "[t]he older cases granted only the injunction and held that the claims for damages by or against numerous persons must be tried in separate actions at law, . . . [r]ecent decisions . . . show an inclination to assess compensation in the unified proceeding, applying the principle that equity once having taken jurisdiction will wind up the whole controversy. Of course, if the problems of damages were very difficult, the balance of convenience would favor separate jury trials; but often damages can be assessed mechanically or on the basis of facts already ascertained during the hearings on the injunction." Z. Chafee, *Bills of Peace with Multiple Parties*, 45 Harv. L. Rev. 1297, 1329 (1932) (footnotes omitted).

opt out right in class actions certified under Rule 23(b)(1) and (b)(2) that include monetary claims. *See, e.g., Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 506 (5th Cir. 1981) (back pay; argument "that the settlement agreement violated [class members'] right to due process because it did not provide them a means of opting out . . . is without merit"); *Kyriazi v. Western Elec. Co.*, 647 F.2d 388, 393 (3d Cir. 1981) (back pay; "due process [does] not require receipt of a pre-judgment opportunity to opt out"); *Robertson v. National Basketball Ass'n*, 556 F.2d 682, 686 (2d Cir. 1977) (damages; "(b)(1) settlement does not violate due process").

In short, when it comes to the use of mandatory class actions in circumstances like those at issue here, it can fairly be said that "[their] validation is [their] pedigree." *Burnham v. Superior Court*, 110 S. Ct. 2105, 2116 (1990) (opinion of Scalia, J., joined by Rehnquist, C.J., and Kennedy, J.).

2. The constitutional legitimacy of mandatory class actions that include monetary claims is also confirmed by a full-scale application of the balancing test generally used by this Court to assess due process arguments. *See Mathews*, 442 U.S. at 335; *Connecticut v. Doehr*, 111 S. Ct. 2105, 2112 (1991) (modifying *Mathews* test for application to procedures used in private-party disputes). This test requires an analysis of three factors: (1) the interest of the party asserting the due process claim; (2) the likelihood that the proposed procedure will decrease the risk of an erroneous deprivation of property; and (3) the interests of other parties affected by the procedure, as well as the government's interest in providing or not providing it. Applied to this case, this analysis demonstrates that the interests arrayed against an opt out right for monetary claims in (b)(1) and (b)(2) class actions strongly outweigh the interests in favor of such a right.

a. The individual interest advanced by respondents in this case is to maintain control over the litigation of their

damages claims (though not over their injunctive claims, which they concede are properly amenable to mandatory classwide disposition). Even in absolute terms, but certainly in relative terms, this interest is not very weighty in a properly certified class action where the unnamed plaintiff is "adequately and fairly represented" by the named plaintiffs. When this representational requirement is satisfied, in fact, the individual's interest in controlling either injunctive or monetary claims does not even bear on the accuracy of the adjudicatory process. *See* pp. 24-26, *infra*.

To start with the broader issue, the reality is that individuals rarely can or do exert much control over the trial of claims that turn on generic legal or factual issues. As Judge Spencer Williams of the United States District Court for the Northern District of California has observed, "[a]lmost everyone who has had contact with plaintiffs of tort litigation at the trial court level would admit that, ultimately, everyone and everything *but* the injured plaintiff controls the litigation." S. Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 330 n.23 (1983). Notably, in this very case, although respondents assert a right to opt out of one class action, they nevertheless seek to proceed by using another. That is an effort predicated not on protecting the individual's interest in controlling litigation, but simply in getting another bite at the apple.

In any event, it is clearly implausible to suggest that the individual's interest in controlling litigation applies to monetary, but not injunctive, claims, as respondents and the Ninth Circuit do. *See* Pet. App. 12a ("[respondents] will be bound by the injunctive relief provided by the settlement in MDL 633, and foreclosed from seeking other or future injunctive relief in this case"). Certainly, there is no principled basis for concluding, other than on a case-by-case (or, perhaps, individual-by-individual) basis, which type of relief is more important. For example, there

are damages cases involving amounts that matter little, if at all, to the individual and that are brought as class actions precisely because it would be too expensive to litigate the claims individually. *See, e.g., Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.") By contrast, there are injunctive cases that involve issues of critical importance to unnamed plaintiffs, such as where children go to school (*see, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971)), or under what terms and conditions professional athletes earn their living (*see, e.g., Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977)), or whether employees have been discriminated against and therefore are eligible to be hired or promoted (*see, e.g., East Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395 (1977)). Yet, under the Ninth Circuit's view, the latter (injunctive) cases, but not the former (damages) cases, are subject to mandatory classwide adjudication.

Similarly, there is no reason to suppose that, somehow, an individual is able to bring more to bear on the litigation of a monetary claim than on the litigation of an injunctive claim. That, too, depends on the particulars of a given case and, ultimately, on the capacity of the named plaintiffs to fairly and adequately represent unnamed class members. *See* p. 24, *infra*. But when a class is truly cohesive and the named plaintiffs are able to litigate the case fairly and competently, as Rule 23(b)(1) and (b)(2) require, there is simply nothing about the adjudication of a monetary claim to indicate that the individual's direct involvement is more important in that situation than it would be with respect to an injunctive claim.

b. The second *Mathews* factor, which looks to the effect of the disputed procedure on the risk of an erroneous deprivation, is entitled to little, if any, weight here. Given the existing procedural protections in class actions conducted in accordance with the provisions of Rule 23, it cannot reasonably be argued that the addition of opt out rights as a due process mandate would decrease the likelihood of an incorrect decision. Rather, the key to the accuracy of classwide adjudication is the assurance that the named plaintiffs fairly and adequately represent unnamed class members, an assurance that is amply provided by Rule 23 and existing constitutional protections.

The first thing that Rule 23 does to protect the requirement of adequate representation is to provide criteria that ensure a strong identity of interest between the named and unnamed class members. Thus, the named plaintiffs must show that there are "questions of law or fact common to the class" (23(a)(2)), and that their claims are "typical of the claims . . . of the class" (23(a)(3)). They must also show that they "will fairly and adequately protect the interests of the class" (23(a)(4)). That requirement reinforces the need for an identity of interest (and thus an absence of conflict) between the named and unnamed class members. And as the MDL 633 court's application of the requirement shows (Pet. App. 46a-47a), adequacy of representation also demands sufficient commitment, financial capacity and, most importantly, the competence of class counsel.

In addition to providing criteria designed to foster adequate representation, Rule 23 requires the district court to play a special role in protecting this right. In this important respect, "from the plaintiffs' point of view, a class action resembles a 'quasi-administrative proceeding, conducted by the judge.'" *Shutts*, 472 U.S. at 809 (quoting 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 23.45 [4.-5] (1984) (other citations omitted)). *See also Shutts*, 472 U.S. at 809 (district court has obligation

to inquire into "any other matters that will bear upon proper representation of the absent plaintiffs' interest") (citations omitted). The court has at its disposal a variety of procedural devices to carry out this assignment, including the ability to limit the issues that can be tried on a classwide basis (23(c)(4)), to create subclasses where necessary (*ibid.*), and to impose conditions on the named plaintiffs or on any plaintiff-intervenors (23(d)(3)). Moreover, the court may, "for the protection of the members of the class . . . [require] that notice be given in such manner as the court may direct to some or all of the [class] members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action" (23(d)(2)).[13] And if a class action is settled, as MDL 633 was, the court must determine whether the settlement is "fair, adequate, and reasonable," after requiring that notice be provided and that class members be given an opportunity to object to the disposition (23(e)). *See* Pet. App. 31a-77a.[14]

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[13] *See also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950) ("notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all"); *Restatement (Second) of Judgments*, § 41, comment (e), at 404 (1980) ("The process of examining th[e] competence [of the representative parties] may be accompanied by notice to the class, or its salient members, and affording them opportunity to dispute the representative's fitness.") (citations omitted).

[14] This case presents no issue concerning whether due process requires notice to unnamed class members in a mandatory class action. Respondents raised no such claim in the lower courts; and, in any event, the MDL 633 court required widespread newspaper notice throughout the affected states, with the result that several objectors came forward and fully litigated the issue of adequate representation, among others, in the MDL 633 proceedings. Pet. App. 41a-42a.

Finally, even with the extensive protections provided by Rule 23, no unnamed class member can be conclusively bound by the judgment without being given the opportunity to contest the adequacy of representation in a separate action; and if the court in that separate action finds an absence of adequate representation, the plaintiff is free to litigate his or her claim anew. That due process right, established by this Court more than fifty years ago in *Hansberry v. Lee*, has been enforced by the lower federal courts. *See, e.g., Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973); *In re Four Seasons Sec. Laws Litig.*, 59 F.R.D. 657 (W.D. Okla. 1973). In a real sense, then, an unnamed plaintiff already has the right to opt out of a class action—even after it is over—if his or her individual interest was not properly protected in the case.[15]

In these circumstances, it is difficult to see how an opt out right could further decrease the likelihood of an erroneous deprivation. The requirement of an identity of interests between named and unnamed plaintiffs, the assurance of adequate resources and qualified counsel, the unique role of the court in looking after the interests of unnamed class members, and the ultimate opportunity to dispute adequacy in a second proceeding all contribute to making the likely accuracy of a class action decision particularly high. Individual control over separate litigation adds nothing significant to (and does not itself include any of) these protections.

c. On the other side of the *Mathews* balance are the systemic interests in efficiency and fairness that are promoted by mandatory class actions. Most significantly, of

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[15] Respondents in this case did in fact challenge the binding effect of the judgment in MDL 633 by arguing that their interests were not properly protected by the named plaintiffs in that case. The Ninth Circuit rejected the claim, concluding that respondents had "fail[ed] to present facts which indicate a lack of adequate representation." Pet. App. 9a; *see also* Pet. App. 20a-25a (district court rejection of respondents' adequacy contention).

course, is the interest in avoiding multiple litigation of essentially the same claim. The burdens of such repeated litigation can be very high, clogging the federal courts and causing defendants to bear these heavy litigation costs in case after case. It is common knowledge that mass tort cases in areas like asbestos, where Rule 23 currently does not permit mandatory class actions, are almost incapacitating some federal courts. *See, e.g., Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 652 (E.D. Tex. 1990) ("[i]f the court could somehow close thirty cases a month, it would take six and one-half years to try these cases and there would be pending over 5,000 untouched cases at the present rate of filing."). Similarly, the allowance of separate actions depletes the resources of defendants that could sensibly go to paying victims instead of the legal fees of counsel for both sides. *See, e.g., In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 802 (E.D.N.Y. 1991) ("[a]djudication on a classwide basis enables the court to reduce transaction costs, particularly attorneys' fees, thereby maximizing available resources to compensate injured claimants").

All of this expense, moreover, does not make the adjudicatory process more fair or rational. On the contrary, it potentially leads to inconsistent results in identical cases, with outcomes determined more by the locale in which a case is tried or by the effectiveness of counsel in one proceeding compared to the next. *See, e.g., In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 907. Nor can it even be said of this process that it ends up treating individual plaintiffs well: the increasing delays and inconsistent judgments caused by separate proceedings only undermine a plaintiff's confidence in, and respect for, the system. *See, e.g., Cimino*, 751 F. Supp. at 666 (individual damages trials in asbestos cases will mean that "these cases cannot be tried").

In a similar, though more modest, vein, mandatory class actions also promote the systemic interest in settle-

ment, long regarded as the preferable way to resolve disputes. *See, e.g., Marek v. Chesny*, 473 U.S. 1, 10 (1985) ("[Fed. R. Civ. P. 68] expresses a clear policy of favoring settlement"); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) ("Particularly in class action suits, there is an overriding public interest in favor of settlement."). If a defendant can conclude its exposure in a single, comprehensive proceeding, settlement will be far more likely than if, after settling a class action, the defendant may still have to litigate the same issue with numerous opt out parties. Indeed, in the MDL 633 case, the district court expressly indicated that it would have been "highly unlikely" for the case to have settled if the defendants had to face the prospect of future suits by parties who were able to opt out. Pet. App. 52a.

d. A reasonable weighing of these three factors tilts decidedly against a constitutional right to opt out of any properly certified class action, regardless of whether it includes monetary claims. The paramount interest of unnamed plaintiff class members in avoiding an erroneous deprivation of their claims is fully protected by a meaningful and enforceable right to adequate representation. On the other hand, the widely shared systemic interests in avoiding duplicative proceedings with potentially inconsistent results, and in increasing the likelihood of settlement, strongly support the constitutionality of mandatory class actions under Rule 23(b)(1) and (b)(2) for both monetary and injunctive relief.[16]

[16] The due process analysis applicable to defendant class actions raises different considerations. As this Court noted in *Shutts*, unlike plaintiff class members, a defendant may be required "to respond in damages or to comply with some other form of remedy imposed by the court." 472 U.S. at 808. *Cf.* Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1296 (1975) ("whatever the mathematics, there is a human difference between losing what one has and not getting what one wants"). Moreover, the guarantee of adequate representation may require additional measures in a defendant class action, because, at least initially, the named defendants, unlike named plaintiffs, do not select themselves, but are selected by their adversaries. *See* Z. Chafee, *Some Problems of Equity* 237-38 (U. Mich. L. 1950).

This conclusion is strongly supported by the actual practices of the lower federal courts, which deal with class action litigation on a daily basis. Those courts uniformly agree that, where a class can be certified either as mandatory ((b)(1) or (b)(2)), or with an opt out right ((b)(3)), the mandatory action is preferred precisely because "the judgment will have *res judicata* effect as to all the class." *In re A.H. Robins Co.*, 880 F.2d 709, 728 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989). *See, e.g., Kyriazi v. Western Elec. Co.*, 647 F.2d at 393; *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 249, 253 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 (9th Cir. 1976). *See generally* 3B J. Moore et al., *Moore's Federal Practice* ¶ 23.31[3] at 23-236 (2d ed. 1993); 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1772, at 424-26 (1986). Indeed, in recent years, federal courts faced with an explosion of duplicative litigation have come to rely increasingly on the "limited fund" concept of Rule 23(b)(1)(B) to certify mandatory class actions in cases where (b)(3) actions might previously have been used. *See, e.g., In re Granada Partnership Sec. Litig.*, 803 F. Supp. 1236 (S.D. Tex. 1992); *In re Joint E. & S. Dist. Asbestos Litig.*, 134 F.R.D. 32 (E. & S.D.N.Y. 1990); *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703 (E.D. Mich. 1985). These experience-based conclusions are entitled to respect.

Finally, while it is true that many monetary claims arise in (b)(3) class actions, where Rule 23 already provides opt out rights, that is no reason to erode the efficient and effective use of (b)(1) and (b)(2) class actions, like this one, that properly include such monetary claims. Moreover, given the current pressures on federal court dockets, it makes little sense to foreclose reconsideration of the (b)(3) opt out right. The drafters of the

Federal Rules adopted that provision almost thirty years ago, when the effects of mass torts (and similar damages claims) on the federal courts could not have been anticipated. As then-Judge Frankel wrote when the current version of Rule 23 was adopted:

> There is nothing magic or constitutionally vital about the "true" class action or *in rem* proceedings except that the terms and their implications are matters of old habit for us. Underlying those familiar concepts are familiar notions of necessity or convenience or "practicability" weighed with or against basic principles of fairness. Such notions are flexible and adaptable to the emerging needs of an increasingly complex community. They may be sensibly and justly applied in ways that will make it entirely fair to render judgments "binding" upon absent parties in actions that were formerly . . . non-binding.

M. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 46 (1967) (footnote omitted). Those words are even more apt today.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 92-1968

In The
Supreme Court of the United States
October Term, 1993

TICOR TITLE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

WALTER THOMAS BROWN AND JEFFREY L. DZIEWIT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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No. 92-1988

In The

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October Term, 1993

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

The district court in this Rule 23(b)(3) federal antitrust class action for treble damages dismissed the damage claims of the class under the doctrine of *res judicata* based upon the settlement of an earlier federal antitrust class action in which essentially only injunctive relief was sought. Although the earlier class action was filed under Rule 23(b)(3), and originally sought treble damages, that case ultimately was certified under Rule 23(b)(1)(A) and 23(b)(2) alone as part of a settlement that was intended to preclude absent class members from opting out and separately pursuing their treble damage claims. The district court in the first case (MDL 633) found that "the shift from bringing [the] case as a Rule 23(b)(3) class action for treble damages to settling it as a Rule 23(b)(1) and (b)(2) class action

providing essentially only injunctive relief . . . was brought about by a concomitant shift from an action seeking treble damages to an action seeking primarily injunctive relief." (Pet. App. 56a) However, in its final order approving the settlement, that court purported to extinguish the unlitigated treble damage claims — claims that could not properly have been asserted in a Rule 23(b)(1)(A) and (b)(2) case. The Ninth Circuit held that it would be a violation of minimal due process if that settlement barred the damage claims of the class in this case.

1. *Background of the Litigation.* In 1985 the Federal Trade Commission began an action against the petitioners for price fixing fees for real estate title examination and search services. *In re Ticor Title Ins. Co.*, Docket No. 9190, FTC Initial Decision of Administrative Law Judge (December 22, 1986). Twelve private class actions, filed in the wake of the FTC's complaint, were consolidated in the Eastern District of Pennsylvania as MDL 633. *In re Real Estate Title and Settlement Serv. Antitrust Litig.*, 1986-1 Trade Cases (CCH) ¶67,149 (E.D. Pa. 1986). The consolidated cases sought tens of millions of dollars in damages on behalf of consumers who purchased title search and examination services at fixed prices in thirteen states. Shortly after consolidation of the private cases, this Court handed down its decision in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985). *Id.* at 62,922.

The *Southern Motor Carriers* decision was construed by class counsel as being adverse to the class members' claims. *Id.* at 62,923. Class counsel failed to distinguish among the various state regulatory schemes in assessing the impact of the *Southern Motor Carriers* decision. *Id.* at 62,932. In early 1986, the MDL 633 class representatives entered into a settlement under which they abandoned the damage claims of the class. Certification was then sought under Rules 23(b)(1) and (b)(2). *Id.* at 62,928. Dropping the damage claims at the time of settlement was intended to avoid certification under Rule 23(b)(3) and thereby eliminate the right of objecting class members to opt-out. *Id.* at 62,929.

Attorneys General from several states, including Arizona and Wisconsin, objected to the settlement. *Id.* at 62,926-932. Among other things, it was argued that the effect of the *Southern Motor Carriers* decision varied from state to state. *Id.* at 62,927. In states where the title insurers' price fixing was not actively supervised, for example, *Southern Motor Carriers* had no impact whatsoever. *Id.* at 62,932.[1]

The MDL 633 court held that none of the class members could opt-out because the class had been certified under Rule 23(b)(1) and (b)(2), rather than Rule 23(b)(3). *Id.* It overruled all objections and approved the settlement. It acknowledged that the claims involved tens of millions of dollars of overcharges by the defendants (*Id.* at 62,935) but nevertheless entered a judgment purporting to extinguish these damage claims for all class members, including the absent Arizona and Wisconsin class members. *Id.*

The Arizona Attorney General appealed the refusal to allow absent class members to opt-out. The Third Circuit affirmed without opinion. *In re Real Estate Title and Settlement Serv. Antitrust Litig.*, 815 F.2d 695 (3d Cir. 1988), *cert. denied*, 485 U.S. 909 (1988). In a subsequent decision by the Third Circuit in 1989 (vacating an injunction by the MDL 633 court against the Arizona Attorney General who was then seeking damages for the Arizona class members in the Arizona state courts), the Third Circuit observed that the absent Arizona class members in MDL 633 had not been provided with the minimum procedural protections required by this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and explained its earlier affirmance without opinion of the MDL

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[1] Liability of the defendants under the antitrust laws turned on whether they were entitled to state action immunity under *Parker v. Brown*, 317 U.S. 341 (1943). The test for state action immunity has two prongs: (1) actions alleged to be violations of the antitrust laws must be taken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation and (2) there must be active state regulation. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). This Court's *Southern Motor Carriers* decision only dealt with the first prong. Thus, in those states where there was insufficient regulation of the defendants, the *Southern Motor Carriers* decision was superfluous to the state action defense.

633 judgment as having been based on the assumption that the absent class members could always obtain collateral review. *In re Real Estate Title and Settlement Serv. Antitrust Litig.*, 869 F.2d 760, 762-763, 764 n. 1 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989).

Six months after the Third Circuit's 1989 decision in *In re Real Estate Title and Settlement Serv. Antitrust Litig.*, the FTC entered a final order finding that there had been no active state regulation of search and examination rates in either Arizona or Wisconsin and that the defendant title insurers were guilty of price fixing in those states. *In re Ticor Title Ins. Co.*, Docket No. 9190, p. 13-20, FTC Final Order (September 19, 1989). On review in this Court last term,the FTC's conclusion that the title insurers were *not* entitled to state action immunity in Wisconsin was affirmed and the question of petitioners' entitlement to state action immunity in Arizona was remanded for further consideration. *Federal Trade Comm'n. v. Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2176 (1992). This Court's decision thus confirmed the correctness of the arguments advanced by the Attorneys General in MDL 633 that the effect of *Southern Motor Carriers* on the class' damage claims varied from state to state.

2. *The Proceedings Below*. This treble damage suit was filed on the heels of the FTC's Final Order. The district court granted defendants' motion for summary judgment on the ground that the MDL 633 judgment was *res judicata*. On appeal plaintiffs argued that either: (1) MDL 633 was a case properly certified under Rules 23(b)(1) and (b)(2) — in which case there could be no *res judicata* effect on plaintiffs' damage claims because those claims could not be raised in such a proceeding — or (2) plaintiffs had been denied due process because they had no opportunity to opt-out of MDL 633 before their substantial damage claims were surrendered. (Appellant's Reply Br. at 2-3) In addition, plaintiffs argued that they had been inadequately represented by the class representatives in MDL 633, none of whom were from Arizona or Wisconsin. The Ninth Circuit reversed the district court on the ground that plaintiffs' due process rights had been violated. It rejected plaintiffs' adequacy of representation arguments but never addressed the

fact that the class representatives' claims were not typical of those held by the absent Arizona and Wisconsin class members. It did not address plaintiffs' contention that *res judicata* simply did not apply.

On October 1, 1993, the parties reached a settlement in this case that provides for cash payments of over $2.8 million to the Arizona and Wisconsin class members. The express intention of the parties in settling this case was to moot the then-pending petition for certiorari, and the Court was so informed. On October 4, 1993, unaware of the settlement agreement, this Court granted certiorari. The Court denied a subsequent motion to defer briefing and argument pending final approval of the settlement in the district court. The parties have advised both this Court and the district court that they are taking the steps necesssary to effectuate the settlement, notwithstanding the granting of certiorari.

SUMMARY OF ARGUMENT

If the MDL 633 court did not certify that case under Rule 23(b)(3) for the reason that the damage claims were dropped from the case, then there can be no preclusive effect regarding those claims. But if the damage claims were validly released as part of the settlement bargain, and hence were not dropped from the case, then the class members continued to be common question/ damage claimants and they remained entitled to their constitutional due process rights to notice and opt-out.

1. *Res judicata* was not available to the title insurers as a defense in this case. As a result of the "shift" in MDL 633 from a Rule 23(b)(3) case seeking treble damages to a Rule 23(b)(1)(A) and (b)(2) case for "essentially only injunctive relief," the damage claims were effectively dropped from the case. In MDL 633, as in any other antitrust case, the damage claims were sought under Section 4 of the Clayton Act, 15 U.S.C. §15, whereas injunctive relief was sought under Section 16 of the Clayton Act. 15 U.S.C. §26. Rule 23 does not permit (b)(1)/(b)(2) class actions in Section 4 Clayton Act cases, any more than in mass tort cases such as those referred to by petitioners at page 27 of their brief (acknowledging that such cases cannot

be certified under 23(b)(1)(A) or (b)(2) where notice and the right to opt-out are not provided). It is beyond dispute that damage claims may not be asserted in a Section 16 case. Accordingly, the unlitigated decree in MDL 633 could not preclude the class' damage claims. The Ninth Circuit's decision therefore can and should be affirmed without reaching the constitutional issue raised by petitioners.

2. If *res judicata* did bar the damage claims in this case, then plaintiffs' due process rights would be violated. "[D]ue process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt-out' or 'request for exclusion' form to the Court." *Shutts*, 472 U.S. at 812. Petitioners' interpretation of *Shutts* as involving only an issue of the jurisdictional reach of state courts is incorrect. That interpretation is predicated on the false premise — claimed to be "the key to this case" — that "state courts can only assert jurisdiction over parties having minimum contacts with the state." Petitioners' Brief at 12. That premise was rejected in *Shutts*.

Shutts held that a state court *may* constitutionally exercise jurisdiction over absent class members who have *no* minimum contacts with the state. This aspect of *Shutts* was foreshadowed in both *Hansberry v. Lee*, 311 U.S. 32 (1940) and *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950). The balance of the *Shutts* holding, like those in *Hansberry* and *Mullane*, implicates the procedural fairness aspect of due process. The portion of *Shutts* at issue here is its specification of the requirements of minimal due process in cases wholly or predominately for money damages. *Shutts* elucidates five procedural requirements in such cases, one of which is the right to opt-out. The minimal procedural due process requirements set out in *Shutts*, like those announced in *Mullane*, are equally applicable to federal courts. Because the absent Arizona and Wisconsin class members did not have an opportunity to opt-out of MDL 633, their due process rights would be violated if their damage claims were barred by *res judicata*. Moreover, clear differences between the claims of the absent Wisconsin and Arizona class members and those of the class representatives in MDL 633 establish a sufficient degree of antagonism to establish inadequate representation.

3. This case does not present an issue regarding the possible extension of *Shutts* to cases properly certified under Rules 23(b)(1) or (b)(2) whenever a monetary element is involved. The type of monetary recovery available under those subdivisions of Rule 23 is essentially equitable in nature; common law type damage claims are properly certifiable only under Rule 23(b)(3). Here, the monetary elements involved were the equivalent of common law damages claims, *Albrecht v. Herald Co.*, 452 F.2d 124, 127-28 (8th Cir. 1971), and as such were unavailable in an action certified under 23(b)(1)(A) and (b)(2). While it is not necessary, therefore, to decide whether the Due Process Clause of the Fifth Amendment requires a right to opt-out in 23(b)(1)(A) and (b)(2) cases that involve a monetary component, petitioners plainly are incorrect in suggesting that no principled basis exists for a constitutional distinction between claims for injunctive relief (including certain types of equitable recovery of monies) and common law type claims for money damages. First, equitable claims never occasion a right to trial by jury under the Seventh Amendment, even when recovery of money is involved, whereas common law damage claims almost always give rise to that right. Secondly, the Due Process Clause itself logically encompasses a distinction between damage and injunctive claims. Common question claims require different procedural protections than claims for injunctive or declaratory relief. The presumed identity of interests of representatives and absent class members in cases brought under 23(b) (2), for example, may provide a sufficient basis for relying on adequacy of representation as the sole due process protection accorded absent class members. But the heterogeneity of class members in a Rule 23(b) (3) class action and the individualized nature of their claims dictates a need to ensure greater control by individual class members over the outcome of the litigation and the disposition of their property rights. This case provides a classic example of the need for an opt-out right in cases involving claims for monetary damages.

ARGUMENT

I. THIS CASE DOES NOT PRESENT A CONSTITUTIONAL QUESTION

Petitioners' first two formulations of the question presented both attempted to raise issues of constitutional dimensions[2] while their third iteration poses a procedural issue which is not presented by the record in this case:

> This case presents the question whether unnamed plaintiff class members have a right to opt-out of a federal court class action certified under Rule 23 (b)(1) and (b)(2) of the Federal Rules of Civil Procedure whenever claims for monetary relief are involved.

(Pet. Br. at 2) Petitioners' three different statements of the issue are not fairly presented by the record in this case nor are they properly before this Court for decision.

The MDL 633 court decided what opt-out rights would be extended to members of the MDL 633 settlement class. *In re Real Estate Title Settlement Services Antitrust Litigation*, 1986-1 Trade Cases (CCH) ¶ 67,149 (E.D. Pa. 1986) (Pet. App. 31a), *aff'd without opinion*, 815 F.2d 695 (3d Cir. 1987) (Pet. App. 78a), *cert. denied*, 485 U.S. 909 (1988) (Pet. App. 79a). Whether right or wrong, that decision has become final and is not before this Court for review or modification. What was before the lower courts in this case and what is before this Court for decision now is

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[2] Certiorari was granted limited to Question No. 1 in the Petition for Writ of Certiorari which stated:

> Whether a federal court may refuse to enforce a prior federal class action judgment, properly certifiable under Rule 23 on grounds that absent class members have a constitutional due process right to opt-out of any class action which asserts monetary claims on their behalf.

Pet. Br. at (1). The Brief for Petitioners restated the question presented but sought to preserve the alleged constitutional issue:

> Whether a federal court may refuse to enforce the judgment in a nationwide class action certified under Rule 23(b)(1) and 23(b)(2) on the ground that unnamed class members have a constitutional right to opt out of any class action asserting monetary claims.

Pet. Br. at (i).

the question of the preclusive effect[3] of the settlement agreement in MDL 633 on absent members of the class.

Contrary to petitioners' formulation of the question presented, the Ninth Circuit did not "refuse to enforce the [MDL 633] judgment." (Pet. Br. at (i)) The Ninth Circuit gave full preclusive effect to the settlement of the injunctive claims but did not bar the damage claims which could not have been asserted in a class action certified under Rules 23(b)(1) and 23(b)(2). The Ninth Circuit stated:

> Brown will be bound by the injunctive relief provided by the settlement in MDL 633, and foreclosed from seeking other or further injunctive relief in this case, but *res judicata* will not bar Brown's claims for monetary damages against Ticor.

982 F.2d at 392.

The Ninth Circuit's decision was in accordance with well-established interpretations and traditional applications of the preclusion doctrine and does not implicate any issues of constitutional dimension. Preclusion is limited to those matters which actually were raised or which could have been raised in the earlier

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[3] Petitioners' repeated reference to "res judicata" is a malapropism when they actually intend to refer to the preclusion doctrine. "Res judicata" means literally "that which has been decided" and necessarily implies a *decision* by a court or a jury while preclusion is a more general term which embraces settlement agreements such as the one in MDL No. 633. *See generally* 18 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 4402 (1981).

"The basically contractual nature of consent judgments has led to general agreement that preclusive effects should be measured by the intent of the parties." 18 C. Wright., A. Miller and E. Cooper, § 4443 at 384 (1981) (collecting cases); *see also, e.g., United States v. International Building Co.*, 345 U.S. 502, 505-06 (1953) ("A judgment entered with the consent of the parties may involve a determination of questions of fact and law by the court. But unless a showing is made that that was the case, the judgment has no greater dignity, so far as collateral estoppel is concerned, than any judgment entered only as a compromise of the parties."). *Ashley v. City of Jackson, Miss.*, 464 U.S. 900, 902 (1983) (consent decree is "little more than a contract between the parties, formalized by the signature of a judge" and "cannot be used as a shield against all future suits by nonparties seeking to challenge conduct that may or may not be governed by the decree." (Rehnquist, J., dissenting to denial of certiorari).

suit. *See generally* 18 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 4412 (1981) (collecting cases). Before the merger of law and equity, for example, an adverse decision in an action at law would not bar a subsequent suit in equity because the equitable claims could not have been raised in the first suit. *E.g., Northern Assur. Co. v. Grand View Building Ass'n*, 203 U.S. 106 (1906); *Boyce's Executors v. Grundy*, 28 U.S. (3 Pet.) 210 (1830). Conversely, an earlier decision on injunctive claims (such as the settlement of the injunctive claims in MDL 633) would not bar a later suit for damages (such as those alleged by respondents here) because the damage claims could not have been asserted in the earlier suit in equity. *Ash Sheep Co. v. United States*, 252 U.S. 159, 170 (1920). In a wide variety of circumstances, the preclusive effect of earlier judgments is routinely limited where constraints of subject matter jurisdiction,[4] discretionary refusal

[4] Where the first court did not have jurisdiction over certain claims, a second suit alleging those claims is not precluded by the first action. *E.g., Mitchell v. Humana Hospital-Shoals*, 942 F.2d 1581, 1582 n.1 (11th Cir. 1991) (civil rights claim not barred by earlier unemployment compensation case in which civil rights claim could not have been raised); *North v. Walch*, 881 F.2d 1088, 1093-95 (D.C. Cir. 1989) (preclusion "applies only if the litigant . . . could have raised the issue in the earlier action"); *United States ex rel. Villa v. Fairman*, 810 F.2d 715, 718 (7th Cir. 1987) (habeas corpus action challenging length of sentence not barred by settlement of earlier civil rights action challenging conditions of confinement where length of sentence could not have been challenged); *Bottini v. Sadore Management Corp.*, 764 F.2d 116, 121-22 (2d Cir. 1985) (earlier ejectment action in city court with limited jurisdiction does not bar subsequent civil rights claim).

to exercise pendent jurisdiction,[5] procedural, [6] temporal[7] or other limitations[8] prevented a matter from being raised in the first suit.

In accord with these principles, it is also well-established that a class action seeking only injunctive or declaratory relief does not preclude a subsequent suit for damages. *Norris v. Slothouber*, 718 F.2d 1116, 1117 (D.C. Cir. 1982); *Herron v. Beck*, 693 F.2d 125, 127 (11th Cir. 1982); *Jones-Bey v. Caro*, 535 F.2d 1360, 1362 (2d Cir. 1976). In *Jones-Bey*, for example, a prison inmate was not precluded from pursuing damage claims relating to unconstitutional prison conditions that were the predicate for a consent judgment affording declaratory and injunctive relief in a prior class case. *Jones-Bey*, 535 F.2d at 1361-1362. As in the present case, the earlier settlement judgment in *Jones-Bey* did not preclude later damage claims because it could not address

[5] *E.g., Merry v. Coast Community College District*, 97 Cal. App. 3d 214, 158 Cal. Rptr. 603 (1979); *Pottern v. Bache Halsey Staurt, Inc.*, 41 Colo. App. 451, 589 P.2d 1378 (1978); *Pope v. City of Atlanta*, 240 Ga. 177, 240 S.E.2d 241 (1977), *cert. denied* 440 U.S. 936 (1979); *Puckett v. City of Emmett*, 113 Idaho 639, 747 P.2d 48, 53 (1987); *Cranwill v. Donahue*, 99 Ill. App. 3d 968, 426 N.E.2d 337 (1981); *Ron Tonkin Gran Turismo, Inc. v. Wakehouse Motors, Inc.*, 46 Or. App. 199, 611 P.2d 658 (1980).

[6] *E.g., Stark v. Starr*, 94 U.S. 477, 485-86 (1877) ("Having required the complainants to proceed in that suit only upon one cause or ground for relief, the court left the other cause open for any future suit which they might choose to bring.")

[7] Where two suits involve different periods of time, a decision covering one time period does not preclude claims during another time period. *E.g., Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322 (1955) (no preclusive effect where second suit involved different time period than first suit which was settled); *Walsh v. Butcher & Sherrerd*, 452 F. Supp. 80 (E.D. Pa. 1978) (no preclusive effect where record showed that second claim had not been released in settlement of first suit).

In MDL 633, the claims settled covered only "the period from January 1, 1981 to December 31, 1985 inclusive" (1980-1 CCH Trade Cas., at 62,924) while the claims alleged in the present case are for the "period from January 7, 1981 to the present time" or April 13, 1990. (Joint App. at 5)

[8] Failure to prove a claim based on a higher burden of proof does not bar a subsequent claim requiring a lesser burden of proof. *E.g., One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 235 (1972).

such claims. *Id.*

Petitioners admit that damage claims may not be asserted in mandatory class actions certified only under Rules 23(b)(1) and 23(b)(2).[9] Treble damage claims under section 4 of the Clayton Act, 15 U.S.C. § 15, cannot be asserted in a class action which has been certified only under Rules 23(b)(1) and 23(b)(2). *E.g.*, In re *Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 342 (E.D. Pa. 1976); *See generally* 7B C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure* § 1781 (1986). The court in MDL 633 specifically ruled that absent members of the settlement class were unable to opt-out to assert their own individual damage claims (1986-1 CCH Trade Cas. at 62,929-30), which unequivocally establishes that the individual damage claims could not have been asserted as part of the class in MDL 633. Moreover, the settlement approved in MDL 633 afforded the class only relief of an injunctive nature.

The Ninth Circuit's decision therefore involved nothing more than the application of well-established principles of preclusion. This decision does not present any constitutional issues or require this Court to decide the propriety of the MDL 633 Court's decision regarding the administration of the class action before it. Since this Court does not ordinarily reach out to decide unnecessary constitutional issues that are not properly presented by the record, the writ of certiorari should be dismissed as improvidently granted. *E.g., Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972); *McClanahan v. Morauer & Hartzell*, 404 U.S. 16 (1971); *Bostic v. United States*, 402 U.S. 547 (1971); *Jones v. State Board of Education*, 397 U.S. 31 (1970); *Palmieri v. Florida*, 393 U.S. 218 (1968); *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968); *Johnson v. Massachusetts*, 390 U.S. 511 (1968); *Smith v. Mississippi*, 373 U.S. 238 (1963); *Needelman v. United States*, 362 U.S. 600 (1960); *McCarthy v. Bruner* , 323 U.S. 673 (1944); *Tyrrell v. District of Columbia*, 243 U.S. 1 (1917).

[9] "It is common knowledge that [Rule 23 currently does not permit mandatory class actions in] mass tort cases in areas like asbestos. . . . " Pet. Br. at 27.

II. THE CERTIFIED QUESTION WAS DECIDED IN PHILLIPS PETROLUEM CO. V. SHUTTS

Petitioners contend that "the key to this case. . . [is that] state courts can only assert jurisdiction over parties having minimum contacts with the state" whereas "the Constitution allows federal courts to exercise adjudicatory power at least with respect to all persons and property located in the United States." (Pet. Br. 12) But *Shutts* holds that state courts *may* exercise jurisdiction over absent class members who have no minimum contacts with the forum state.[10] The *Shutts* opt-out holding cannot therefore turn on a question of jurisdictional power under the Fourteenth Amendment.

That *Shutts* involved considerations of procedural fairness, rather than territorial jurisdiction, is apparent on the face of the opinion. It is clear from the Court's comment that if an opt-in requirement (advocated by petitioners there) were required by due process, that would entail "invalidation of the class action provision of the Federal Rules of Civil Procedure". 472 U.S. at 813 (emphasis added). That would hardly be the case if the opt-in/opt-out debate in *Shutts* involved only an issue of the territorial scope of a state court's jurisdiction. It is also noteworthy that the opt-out requirement appears in a list of procedural protections commonly required of federal as well as state courts.

This case, like *Shutts*, involves the second aspect of due process, namely, the requirements of procedural fairness. *Shutts*, after holding that a state has jurisdictional power over claims of absent class action plaintiffs without minimum contacts, held that "minimal procedural due process protection" must be accorded such parties. The components of minimal procedural due process are:

1. Notice with an opportunity to be heard and participate in the litigation.

[10] In reaching this conclusion in *Shutts*, the Court adopted an argument advanced there by counsel now representing petitioners in the present case, that "the 'minimum contracts requirement'. . . is an inappropriate constitutional standard for testing the assertion of jurisdiction over nonresident class action plaintiffs." (Brief for Respondents in *Shutts*, pp. 5-6)

2. Notice of the best practicable sort.
3. Notice that describes the action and the plaintiff's rights in it.
4. At a minimum, an opportunity for class members to remove themselves from the class by executing an opt-out or request for exclusion form.
5. Adequate representation by the named plaintiff.

The substantive content of minimal procedural due process owed by a state court to absent class members is coterminous with the minimal due process protection that must be accorded such parties by a federal district court. The due process guarantees of the 5th and 14th Amendments are essentially the same. *See, In re Real Est. Title and Settlement Services Antitrust Lit.*, 869 F.2d 760, 766 n. 6 (3d Cir. 1989); *Pan Am. World Airways, Inc. v. U.S. Dist. Court*, 523 F.2d 1073, 1077 (9th Cir. 1975).[11]

This case falls squarely within the holding of *Shutts*. The title insurers' attempt to whittle down to one the list of five procedural protections enumerated in *Shutts*, in arguing that the constitutional legitimacy of all class actions "turns on an assurance that the named plaintiffs have adequately represented the interests of unnamed class members," (Pet. Br. 18), is a narrow and erroneous conception of due process. It cannot be squared with *Shutts* or the common understanding that minimal procedural due process is owed by all courts, whether federal or state.

III. DUE PROCESS EMBRACES A DISTINCTION BETWEEN CLAIMS FOR MONEY DAMAGES AND CLAIMS FOR INJUNCTIVE RELIEF

The balance of petitioners' argument amounts to an attack on the *Shutts* limitation to cases wholly or predominately for money damages. That attack need not be considered here because this case does not present a situation in which primarily injunctive relief was sought along with incidental claims for monetary relief of an equitable or restitutional nature. Here, the

[11] This principle is reflected in the Advisory Committee Notes to Rule 23, which cites *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), a case originating in state court, in observing that the Rule's notice provisions are designed to meet due process.

case as certified sought primarily injunctive relief, yet the unlitigated judgment is asserted as a bar against common law type damage claims that could not have been asserted in the earlier proceeding. Accordingly, this is not an appropriate case in which to consider whether all claims for monetary relief, including those claims that may properly be pursued in a mandatory class action, occasion a right to opt-out.

Nevertheless, petitioners' fundamental contention — that there is no principled basis for distinguishing between claims for money damages and claims for injunctive relief under the Due Process Clause — is clearly wrong. The argument ignores the Seventh Amendment, which accords a Constitutional jury trial right with respect to claims for money damages but no such right with respect to claims for injunctive relief. *See Beacon Theatre, Inc. v. Westover*, 359 U.S. 500 (1959). Here, the claims for monetary damages were equivalent to common law claims. *See Albrecht v. Herald Co.*, 452 F.2d 124, 127-28 (8th Cir. 1971). Eliminating the right to opt-out in a case involving money damages necessarily impacts on that separate Seventh Amendment right, whereas the inability to opt-out of a class seeking equitable relief entails no similar deprivation.[12]

Petitioners' argument also ignores fundamental considerations relevant to the very due process contentions they advance. Those fundamental concerns involve the differing nature of claims normally brought in a (b) (3) case from those that are typical of (b) (1) and (b) (2) litigation, and the greater potential for abuse in a (b) (3) case. In a classic (b) (1) (A) or (b) (2) case, the claims of the class are inherently cohesive: "the very nature of a (b) (2) class is that it is homogeneous without any conflicting interests between the members of the class." *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 256 (3d Cir. 1975), *cert. denied*, 421 U.S. 1011 (1975). A (b) (2) case envisions a class defined by "the homogeneity and cohesion of its members' grievances, rights and interests." G. Rosen, *Title VII Classes and Due Process: To (b) (2) Or Not To (b) (3)*, 26 Wayne L.Rev. 919, 923 (1980). The relief afforded in a (b) (2) case also applies to the class as

[12] Notably, the right to a jury trial applies to even modest claims for money damages but is not available in cases seeking injunctive relief, even if vastly more important matters are involved.

a whole. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983). Similarly, it has been held that a (b) (1) (A) class is appropriate when "there is a total absence of individual issues." *Tober v. Charnita, Inc.*, 58 F.R.D. 74, 81 (M.D. Pa. 1973).

In contrast, (b) (3) class actions seeking monetary relief do not usually involve a similar degree of homogeneity. Claims of the class representative are far less likely to be typical of the claims of the class as a whole. *Holmes*, 706 F.2d at 1156. While common questions must predominate over individual questions for the class to be certified, substantial rights may hinge on the resolution of questions that affect only some members of the class. *Id.* at 1157.

It is this heterogeneity, inherent in cases involving common law claims for damages, that led the framers of Rule 23 to provide additional protections for absent members of classes involving such claims. Thus in *Holmes*, the Eleventh Circuit observed that:

> [t]he procedural protections accorded to absent class members differ depending on whether the class is certified under (b) (2) or (b) (3). Unlike members of (b) (3) classes, class members of actions certified under (b) (2) ordinarily are not entitled to individual notice and typically do not have the right to opt-out of the lawsuit. These differing levels of protection reflect the assumptions of cohesiveness underlying the two types of classes.

Holmes, 706 F.2d at 1156-57.

The different procedural protection afforded class members in cases seeking monetary damages also reflects the efficacy of a right to opt-out in such cases as compared to cases seeking equitable relief:

> Opting out of a (b) (2) suit for injunctive relief would have little practical value or effect. Even class members who opted out could not avoid the effects of the judgment. A (b) (2) injunction would enjoin all illegal action, and all class members would necessarily be affected by such broad relief.

Id. at 1157.

Because claims for monetary damages present a greater need for protection and because a right to opt-out has greater value in such cases, some courts have held that due process requires the safeguards mandated in a (b) (3) case with respect to the monetary aspects of actions certified under (b) (2), even where the monetary relief sought is equitable in nature. Thus, in *Johnson v. General Motors Corp.*, 598 F.2d 432 (5th Cir 1979), the court held that due process required individual notice before the pecuniary claims of absent (b) (2) class members could be barred, reasoning that when "only equitable relief is sought. . . the due process interests of absent members will usually be safeguarded by adequate representation alone" but that where "individual monetary claims are at stake, the balance swings in favor of the provision of some form of notice." *Id.* at 437-38.

Similarly, in *Holmes*, the Eleventh Circuit held that notice and a right to opt-out should be provided to members of a (b) (2) class with monetary claims for back pay:

> Because "the fundamental justification for not requiring notice to absent class members, nor providing the opportunity to be heard or to exclude themselves from the class, is that the class' cohesive characteristics — its identity of rights and interests — bind the class together so that identical (or at least similar) relief is appropriate, " and because that justification is not present under the facts of this case, we hold that the right to opt-out of the class, normally accorded only to (b) (3) class members, must be extended to all members of this (b) (2) class.

Holmes, 706 F.2d at 1160. (Citations omitted)[13]

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[13] In *Holmes*, the court grounded its decision on Rule 23 rather than the mandates of the Due Process Clause. 706 F.2d at 1160. This approach is consistent with the approach followed by this Court in *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 177 (1974) and *Omni Capital Intern. v. Rudolf Wolff & Co. Ltd.*, 484 U.S. 97, 102 n. 5 (1987), in the which the Court interpreted the Federal Rules of Civil Procedure so as to avoid the need to reach constitutional issues.

In light of these and similar decisions, petitioners' contentions about the willingness of lower federal courts to ignore the distinctions between monetary claims and claims for injunctive relief, and adjudicate "hybrid" cases involving both types of claims without affording class members notice and an opportunity to opt-out with regard to their monetary claims, are grossly overstated. Some courts have treated "mixed" actions exclusively under the more exacting standards of (b) (3). 3B *Moore's Federal Practice*, ¶23.40 [4] at 281. Other courts have addressed mixed actions by eliminating the monetary relief aspect of the case and treating the remainder of the case under (b) (2). 3B *Moore's Federal Practice*, ¶23.40[4] at 23-281. *See Rice v. City of Philadelphia*, 66 F.R.D. 17, 21 (E.D. Pa. 1974). Yet other courts have recognized that, at the monetary relief stage of such an action, class members should receive notice and the opportunity to opt-out. 3B *Moore's Federal Practice*, ¶23.40 [4] at 23-282; *see Holmes v. Continental Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983).

The factors that these courts have taken into account reflect the considerations identified by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976) and confirm that *Shutts* was correctly decided. The three factors to be considered are: (1) the interest of the party asserting the due process claim; (2) the risk of erroneous deprivation and the probable value of additional or alternative safeguards; and (3) the interests of other parties, including the interest of the government in providing or not providing the procedure. *Connecticut v. Doehr*, 111 S.Ct. 2105, 2112 (1991).

With respect to the first factor, every class member with a claim for damages has two substantial interests: (1) the class member's property interest in the cause of action: and (2) the class member's interest in controlling litigation affecting his rights. The substantial nature of these interests is indisputable: in *Shutts*, the Court expressly reaffirmed that "a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs [in the class]." 472 U.S. at 807, *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Moreover, the weight these interests carry is increased because under principles of claim preclusion deprivation of a class member's property through a judgment or settlement is final.

The second *Mathews* factor similarly weighs in favor of affording absent class members opt-out rights. In the absence of notice and a right to opt-out, there are no safeguards that protect a class member's right to control litigation because a class member has no control over his individual claim. Reliance on a class representative's "adequacy" is not a substitute for the opportunity to pursue one's own claim. *See* M. Weber, *Preclusion and Procedural Due Process in Rule 23 (b) (2) Class Actions*. 21 U.Mich.J.L.Ref. 347, 366 (1988). If petitioners' position were correct, then the mandatory class action would become a device to supplant individual rights of action in innumerable contexts. A class action certified under Rule 23(b)(1) or (b)(2) would bar pending individual actions in mass tort cases, even where more favorable adjudications were reasonably expected in the individual actions. (The potential treatment of such claims under Rule 23(b)(1)(B) presents completely different issues). It is not difficult to envision situations in which mandatory class actions would supplant individual actions in circumstances occasioning significant monetary losses to individual claimants. Indeed, that is precisely what happened here. This Court's holding in *F.T.C. v. Ticor Insurance Co.*, 112 S.Ct. 2169 (1992) and the decision of the Ninth Circuit in the present case establish that the Arizona and Wisconsin class members were not subject to the state action defense as were the other members of the class. The proposed settlement in this case, involving over 2.8 million dollars cash consideration, amply reflects the damage claims that would have been surrendered if these class members were required to rely exclusively on the "adequacy" of the class representatives in MDL 633.[14]

The final factor in the balancing test (the interests of other parties and the government) also weighs in favor of affording opt-out rights in cases involving damages claims. Affording class members minimal due process in the form of notice and opt-out rights does not lead to judicial inefficiencies or undermine the class action device. The proof of this lies in the history of

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[14] Even "adequate" representatives trade away or compromise the rights of portions of the class in pursuit of results on a broader scale. And a court reviewing the fairness of a settlement does not consider the merits of each individual's claim but addresses the fairness of the overall settlement. *See* Weber, 21 U.Mich.J.L.Ref. at 365-66.

Rule 23(b)(3) class actions. Requiring notice and opt-out rights has neither rendered these cases unmanageable nor deterred plaintiffs with meritorious claims from proceeding under this section. The societal cost of providing these procedural rights is minimal compared to the dangers to the judicial process of eliminating them.

In short, petitioners' analysis of the due process implications of the right to opt-out in cases involving monetary damages is shorn of the historical context and purposes of Rule 23 and ignores the efficacy of the opt-out right when claims for money damages are involved. The importance of the opt-out right in cases involving claims for monetary damages is starkly apparent here where the existence of that right was necessary to allow the absent Arizona and Wisconsin class members to pursue viable monetary claims unavailable to other members of the class.

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted. In the alternative, the judgment of the court of appeals should be affirmed.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TICOR TITLE INSURANCE COMPANY, *et al.*,
Petitioners,
v.
WALTER THOMAS BROWN and JEFFREY L. DZIEWIT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

Respondents were members of the class in MDL 633, which the district court certified, after full and careful consideration, as a mandatory class action under Rule 23(b)(1) and (b)(2). The judgment in that case explicitly dismissed with prejudice the claims that respondents then brought in the present suit. Pet. App. 76a-77a. Nevertheless, the Ninth Circuit permitted the relitigation of those claims, holding that respondents could not constitutionally be bound by the MDL 633 judgment because the due process clause of the Fifth Amendment entitles persons with monetary claims to opt out of a class action

(*id.* at 11a-12a), even where, as here, they were adequately represented in that action (*id.* at 8a-11a). In so holding, the Ninth Circuit cast aside this Court's repeated pronouncements that absent class members may constitutionally be bound if adequately represented (*e.g., Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989); *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 874 (1984); *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 367 (1921)) based entirely on its belief that this Court had altered that principle in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Pet. App. 11a-12a.

As our opening brief explains, that ruling, which would seriously impair federal-court efforts at fair and efficient management of class litigation, does not follow from *Shutts* and is insupportable under either the personal jurisdiction or procedural fairness components of due process doctrine. Respondents and their *amici* have offered nothing to undermine those showings. In particular, respondents make no argument at all based on personal jurisdiction, instead defending the proposition that due process requires opt-out rights even for class members resident in the State, or particular district, where the federal court sits. And as to that proposition, neither respondents nor their *amici* offer any sound reason why, even though respondents' rights were found to have been adequately represented in the class action, the Constitution still entitles each of them to file separate suits to litigate the very same claims, simply because the claims are for money.

1. Respondents first seek to avoid the question on which certiorari was granted—the due process issue—by arguing that normal *res judicata* principles by themselves entitle them to litigate their damages claims, because those "claims could not have been asserted" in the MDL 633 case. Resp. Br. 12; *id.* at 8-12. This Court, however, ordinarily decides the question that it deemed important enough to warrant a grant of certiorari. Moreover, the Court ordinarily does *not* entertain a claim that was not

even presented to (much less decided by) the court of appeals—which, as the Ninth Circuit's exclusive focus on due process confirms, respondents' present *res judicata* contention was not. *See, e.g.*, S. Ct. Rule 14.1(a); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551 n.3 (1990); *FTC v. Grolier Inc.*, 462 U.S. 19, 23 n.6 (1983); *Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980).[1]

In any event, the argument is patently meritless. It is not possible to say that respondents' claims for damages could not have been asserted in MDL 633 when those claims *were* in fact asserted there, as respondents acknowledge (Resp. Br. 2 (describing damages claims in MDL 633)), and were explicitly understood to be covered by the judgment dismissing *all* claims (Pet. App. 75a-76a; *see, e.g., id.* at 49a, 56a, 64a). The Ninth Circuit and the Third Circuit recognized that fact. *See* Pet. App. 12a. That the judgment did not provide for the substantial damages sought by the class in MDL 633 hardly changes the fact that such damages were sought and compromised in the litigation—a settlement the district court found eminently reasonable, after "extensive discovery," in light of "counsels' reasonable reassessment of the strength of the case after the decision in *Southern Motor Carriers* [*Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985)]" and "other substantial obstacles" to recovery by plaintiffs. Pet. App. 59a, 56a, 62a. *See id.* at 64a (the class faced "overwhelming risks . . . in achieving any benefits through litigation").

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[1] Respondents' opening brief in the Ninth Circuit argued, on the *res judicata* point, only inadequacy of representation (Br. 15-23) and deprivation of due process (*id.* at 25-29). The brief contains no reference to their present argument (or to the key authorities on which they now rely, Resp. Br. 11-12). Respondents' reply brief in the Ninth Circuit likewise did not present any such argument (or cite their present authorities), instead relying entirely on *Shutts* and due process (Reply Br. 2-5) and the alleged inadequacy of representation (*id.* at 5-11).

Accordingly, the present case is entirely different from the cases relied on by respondents. Resp. Br. 11-12. Those decisions, like *Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984), hold that the bringing of a class action presenting only class-wide claims (notably, those seeking injunctions against class-wide wrongs) do not preclude the later bringing of individual claims based on individual wrongs (notably, those seeking individualized damages)—because the class claimants are concededly *not* representing the individual claims.[2] Here, the MDL 633 class action explicitly presented, and settled, the very damages claims, based on conduct common to class members, that respondents now seek to present again to the courts. Respondents' non-constitutional *res judicata* argument thus furnishes no ground for avoiding the due process issue presented by the petition.

The issue likewise cannot be avoided by questioning the propriety of the class certification in MDL 633 under Rule 23(b)(1) and (b)(2). Respondents do not in fact raise any such challenge in this Court; nor could they, because they presented no such argument to the court of appeals, which itself did not question the MDL 633 certification.[3] There was good reason, moreover, for the

[2] For example, in *Jones-Bey v. Caso*, 535 F.2d 1360 (2d Cir. 1976), respondents' principal authority (Resp. Br. 11), the court explained that the individual damages claims of the plaintiffs (pre-trial detainees) were not foreclosed by an earlier consent judgment because "[t]he consent agreement did not, by its terms or otherwise, dispose of those claims, and indeed, the class representatives in [the class action] never sought to represent pre-trial detainees pressing individual damage claims in separate actions." *Id.* at 1362.

[3] Respondents in this Court note that they are not taking issue with the MDL 633 certification. *See, e.g.*, Resp. Br. 8 ("Whether right or wrong, [the MDL 633 certification of a mandatory class] has become final and is not before this Court for review or modification."); *id.* at 12 (this case does not "require this Court to decide the propriety of the MDL 633 Court's decisions regarding the administration of the class action before it"). And, as noted above (note 1, *supra*), in the Ninth Circuit respondents raised only

absence of any non-constitutional issue in the courts below: once any due process concerns with the giving of binding effect to a class action judgment are satisfied—the precise issue presented for decision here—the strong finality policies behind the federal law of *res judicata* preclude a collateral attack on a fully considered certification decision raising non-constitutional Rule-based grounds alone, particularly by persons whose interests were vigorously represented on that very issue in the class action, as respondents' were in MDL 633. *See* Pet. App. 43a-53a. In any event, the MDL 633 certification decision in this case—affirmed by the Third Circuit, 815 F.2d 695 (1987), *cert. denied*, 485 U.S. 909 (1988)—was entirely proper, given the appropriateness of primarily injunctive relief for the pricing practices challenged "on grounds generally applicable to the class" (Rule 23(b)(2)) and the risk of "incompatible standards" in the restructuring of petitioners' activities before rating bureaus (Rule 23(b)(1)(A)). *See* Pet. App. 47a-53a. In short, the due process issue decided by the Ninth Circuit is the only issue properly presented for decision in this Court.[4]

2. When respondents face the due process question, they begin their defense of the Ninth Circuit decision by briefly asserting that the opt-out holding of *Shutts* is really about procedural fairness rather than personal jurisdiction. Resp. Br. 13-14. At the outset, however, it is noteworthy

inadequacy of representation and a *Shutts* due process argument as grounds for reversing the district court's judgment giving binding effect to the MDL 633 judgment.

[4] *Amicus* Public Citizen attempts to challenge the MDL 633 class certification as wrong under the standards of Rule 23 (Br. 10-19), but this Court does "not ordinarily address issues raised only by *amici*." *Kamen v. Kemper Fin. Servs., Inc.*, 111 S. Ct. 1711, 1716 n.4 (1991). There is no basis for making an exception for this fact-specific issue here. In addition to the reasons given in text, we note that in all of the cases cited by Public Citizen (Br. 10), the non-constitutional issues were properly raised in the lower court.

that this reading of *Shutts* is a marked departure from respondents' own prior acknowledgement of what *Shutts* held. In the Ninth Circuit, respondents expressly stated that their opt-out argument "only applies with regard to class members from outside the forum state, over whom the court has no personal jurisdiction other than through the effect of class certification. Where personal jurisdiction is otherwise properly asserted by the court, the Supreme Court's holding in *Shutts* is irrelevant." Ct. App. Reply Br. 4.

Respondents' current interpretation of *Shutts* is also wrong. Indeed, their earlier view—that *Shutts* is concerned only with personal jurisdiction and does not establish procedural fairness rights of class plaintiffs within a court's undisputed jurisdiction—is confirmed by simply reading *Shutts*. Not only does the opinion in *Shutts* nowhere engage in a procedural fairness analysis of the sort that respondents themselves now argue is called for—looking to history, established practice, and the factors set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976) (Resp. Br. 18-20)—but it announces at every step that the issue being decided is one of personal jurisdiction over out-of-state class members. It does so repeatedly in defining the arguments presented to the Court.[5] It does so

[5] *See, e.g., Shutts*, 472 U.S. at 799 ("[w]e reject petitioner's jurisdictional claim"); *id.* at 802 (petitioner's claim in lower court "that the Kansas trial court did not possess personal jurisdiction over absent plaintiff class members as required by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and similar cases"); *id.* at 803 (Kansas Supreme Court held that, with notice, opportunity to be heard, opt-out right, and adequate representation, "Kansas could assert jurisdiction over the plaintiff class"); *id.* at 806 ("Reduced to its essentials, petitioner's argument is that unless out-of-state plaintiffs affirmatively consent, the Kansas courts may not exert jurisdiction over their claims. . . . Since Kansas had no prelitigation contact with many of the plaintiffs and leases involved, petitioner claims that Kansas has exceeded its jurisdictional reach and thereby violated the due process rights of the absent plaintiffs."); *id.* at 806-08 (recounting personal jurisdiction principles

again in stating its holding, including the opt-out holding on which the Ninth Circuit relied (Pet. App. 12a, quoting *Shutts*, 472 U.S. at 812): the opinion expressly says that it is setting forth the due-process conditions under which "a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though the plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant" (*id.* at 811).[6] The opinion then immediately confirms that the reason for the opt-out requirement in this context is that it furnishes effective consent to jurisdiction: "[a]ny plaintiff may consent to jurisdiction"; "[t]he essential question, then, is how stringent the requirement for a showing of consent will be." *Id.* at 812. Finally, the opinion reiterates the focus on jurisdiction in concluding its discussion of the issue: "We conclude that the Kansas court properly asserted personal jurisdiction over the absent plaintiffs and their claims against petitioner." *Id.* at 814. In short, the *Shutts* decision cannot be read as resolving the procedural-fairness due-process rights of class plaintiffs as to whom there is uncontested personal jurisdiction.

As their unsuccessful effort to transform *Shutts* confirms, respondents have abandoned any argument that the MDL 633 court constitutionally could not assert personal jurisdiction over them without providing an op-

of *International Shoe* and successor cases, then describing petitioner's argument that "Kansas should not be able to exert jurisdiction over the plaintiff's claims" absent minimum contacts).

[6] The Court specifically introduced the enumeration of due-process rights in which the opt-out holding appears by stating that "absent plaintiffs as well as absent defendants are entitled to some protection from the *jurisdiction* of a forum State which seeks to adjudicate their claims." 472 U.S. at 811 (emphasis added). *See ibid.* (petitioner's personal jurisdiction argument rejected because a class-action plaintiff is subject to fewer burdens, and gets greater protections, than out-of-state defendants, so that "the Due Process Clause need not and does not afford [class plaintiffs] as much protection from state-court jurisdiction as it does [defendants in non-class suits]").

portunity to opt out. *See also* Br. in Opp. 8. One of respondents' *amici* attempts such an argument, but the attempt consists of a single paragraph that summarily invokes the idea of federalism as well as the notion, supposedly based in Fed. R. Civ. P. 4, that statutory authorization is required to extend personal jurisdiction to out-of-state class members. Owens-Illinois *Amicus* Br. 4-5. For reasons already explained, however, this argument is wrong. It is inherent in the sovereignty of the United States under our federalist system that, regardless of the basis for subject matter jurisdiction, the personal jurisdiction of courts of the United States can extend throughout the United States. *See* Pet. Br. 12-15.[7] Moreover, the constitutionality of nationwide personal jurisdiction over class plaintiffs, the issue here, is unaffected by the provisions of *Rule 4* governing *service of process* on *defendants*. And, in any event, Rule 23 and the multidistrict litigation statute, 28 U.S.C. § 1407, provide ample authority for the exercise of multistate jurisdiction here. *See* Pet. Br. 13 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). There was, therefore, no constitutional defect in the MDL 633 court's personal jurisdiction over respondents.

3. Respondents finally attempt, independently of *Shutts*, to defend the view that the presence of monetary claims triggers a due process right to opt out for any unnamed class members, including those indisputably within a federal district court's jurisdiction and adequately represented in that proceeding. Resp. Br. 14-20. This Court, however, has repeatedly recognized that class actions come within the longstanding principle that a judgment is binding on "a person [who], although not a party, has his interests adequately represented by someone with the

[7] The reference of Owens-Illinois to diversity cases (Br. 4), aside from confusing subject matter with personal jurisdiction, is peculiarly inapt in a case, like this one, raising a federal claim—indeed, a claim under a federal statute that specifically provides for nationwide service against defendants. *See* 15 U.S.C. § 22.

same interests who is a party." *Martin v. Wilks*, 490 U.S. at 762 n.2; *see Hansberry v. Lee*, 311 U.S. at 42-43 ("[T]his Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it. . . . It is a familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present . . . .") (citations omitted). Neither respondents nor their *amici* offer any sound reason why that principle cannot constitutionally justify a mandatory class action, like MDL 633, simply because it involves monetary claims.[8]

As an initial matter, both history and established practice recognize that mandatory class actions *can* constitutionally include monetary claims. This Court's earliest decisions approving mandatory class actions involved such claims. *See, e.g., Supreme Tribe of Ben-Hur v. Cauble, supra*; *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1854). Likewise, the terms of Rule 23(b)(1) and (b)(2) at present permit, and have frequently been invoked to authorize, mandatory class actions that involve substantial monetary claims, *e.g.*, where inconsistent duties otherwise would arise, where a limited fund is present, or where substantial back pay is awarded. *See, e.g.*, Pet. Br. 20-21; *Amicus* Br. for Lawyers' Committee for Civil Rights Under Law; *Amicus* Br. for Amer. Insur.

[8] Rule 23, of course, currently provides for a right to opt out in certain types of class actions, and respondents rely extensively on lower court decisions addressing the proper classification of particular cases under that Rule. *See* Resp. Br. 15-18. The present case, however, concerns the requirements of the Constitution, not Rule 23. As this Court specifically observed in *Hansberry*, the Constitution does not "compel the adoption of the particular rules thought by this court to be appropriate for the federal courts." 311 U.S. at 42.

Ass'n, *et al.* Notably, respondents do not challenge the validity of mandatory class actions in such cases.[9]

This case, however, is such a case. The MDL 633 class was certified under Rule 23(b)(1) and Rule 23(b)(2), after explicit consideration of the presence of substantial monetary claims. And, as previously noted, neither respondents nor the courts below have taken issue with the propriety of the MDL 633 class certification under those provisions. Acceptance of that certification, together with acceptance of the validity of mandatory class actions under (b)(1) and (b)(2), is sufficient to dispose of respondents' due process challenge.

More broadly, respondents' position confirms that the presence of monetary claims cannot raise a constitutional bar to a binding class action: once all class members' interests are adequately represented, there is no basis in due process analysis for the constitutional distinction between monetary and non-monetary claims made by the Ninth Circuit. As our opening brief explains (Pet. Br. 21-30), class members with monetary claims have no greater practical interest than class members with non-monetary claims in controlling the litigation of their claims, once they are ensured adequate representation of those claims by the named plaintiffs and their counsel. Indeed, any interest in individual control is hard to accord much weight in a case, like this one, where the separate suit is itself a class action. Opt-out rights, moreover, would add nothing appreciable to the likelihood of an accurate adjudication, and certainly no more in monetary cases than in non-monetary cases: that interest is fully protected by the guarantee of adequate representation (Rule 23(a)(4)), enforced initially by the class-action

[9] Neither respondents nor their *amici* assert that there is any substantial authority among the lower courts holding that opt-out rights are *constitutionally* required—as opposed to appropriate in the exercise of judicial discretion in certain circumstances—in class actions certified under (b)(1) or (b)(2). *See, e.g.*, Resp. Br. 15-18; ATLA *Amicus* Br. 15-19. *But see, e.g., DeGier v. McDonald's Corp.*, 76 F.R.D. 125 (N.D. Cal. 1977).

court and then again in any collateral attack on the judgment.[10] On the other side of the balance, by contrast, lie weighty systemic interests in fairness, consistency, and efficiency—in avoiding, *e.g.*, court-clogging repetitious litigation, inconsistent results on identical issues, deprivation of other litigants' opportunity for prompt adjudication or meaningful relief, and deterrence to settlements. These interests are more than sufficient as a constitutional matter, in monetary no less than non-monetary cases, to justify binding all plaintiff class members through a class action where, as here, their interests have been found adequately represented.

In contending otherwise, respondents first make a brief reference to the Seventh Amendment as a basis for special treatment of damages claims. Resp. Br. 15. But they do not assert that all damages claims require opt-out rights for that reason, and they never say what category of monetary claims supposedly triggers such rights. Indeed, respondents nowhere explain why the Seventh Amendment is relevant at all to the due process question presented here. Certification of a mandatory class action requires no sacrifice of Seventh Amendment rights: nothing in Rule 23 precludes giving full protection to such rights (or any other constitutional rights) even in a mandatory class action. *See* Fed. R. Civ. P. 38(a); *Ross v. Bernard*, 396 U.S. 531, 539-42 (1970). Claims covered

[10] Class members are also provided the closely related guarantees that the class action involve claims common to the class and that the named plaintiffs have claims typical of the class (Rule 23(a)(2), (a)(3)) as well as various other protections of their interests, including notice as appropriate (Rule 23(d)(2)) and the assurance of court approval of any settlement, after notice and a hearing, as "fair, adequate, and reasonable" (Rule 23(e)). There is no argument in this case that respondents were deprived of any of these guarantees. In particular, respondents have not disputed the adequacy of notice. Accordingly, the reliance by *amicus* Association of Trial Lawyers of America (Br. 4-5) on the constitutional and Rule-based notice holdings of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), is misplaced. *See* Pet. Br. 25 nn.13, 14.

by the jury-trial right could easily involve a "limited fund" or otherwise come within the standards of Rule 23 (b)(1) or (b)(2), the validity of which is not challenged by respondents.[11] And there is no apparent basis in logic for supposing that adequate representation is any less a guarantee of fundamental fairness for monetary claims at law (generally covered by the Seventh Amendment) than for monetary claims in equity (generally not). In short, the law-equity distinction among types of monetary claims, vital for Seventh Amendment purposes, has no evident relevance to the present question.

Turning then to the constitutional balance of interests under *Mathews v. Eldridge, supra,* respondents and their *amici* make essentially two arguments for special treatment of (some) monetary claims. First, they suggest that monetary claims may have a lower "degree of homogeneity" than other claims, making a mandatory class action less likely to protect class members' interests. Resp. Br. 16; *id.* at 15-18. Second, they suggest that monetary claims are less "inherently cohesive" than non-monetary claims, making the justification for mandatory class actions involving monetary claims weaker. *Id.* at 15. These assertions, however, cannot support respondents' due process argument.

One problem, applicable to both generalizations, is that the extent to which they are accurate is unclear. Respondents themselves recognize that monetary claims *can* be both homogeneous and cohesive in a large class of cases: even they make their points as matters of "degree" only; and in accepting mandatory class actions under (b)(1) and (b)(2)—the provisions under which the class action at issue in this case was certified—they presumably find homogeneity and cohesiveness constitutionally sufficient in those circumstances. Yet respondents do not identify what the constitutional minimum is for these two concepts, or suggest how much more likely monetary claims are to

[11] *See, e.g., Bower v. Bunker Hill Co.,* 114 F.R.D. 587 (E.D. Wash. 1986); *In re Greenman Sec. Litig.,* 94 F.R.D. 273 (S.D. Fla. 1982).

meet such a minimum; the concepts themselves are far from precisely defined. Premises as uncertain in their validity and ill-defined in their scope as respondents' generalizations are not a firm foundation for a categorical constitutional rule of the sort adopted by the Ninth Circuit.

In any event, respondents' due process claims must fail even if respondents' broad-brush distinctions between monetary and non-monetary claims are accepted as roughly accurate. The question, of course, is not whether there is a rational basis for the distinctions currently embodied in Rule 23 between different types of class actions, some with opt-out rights, others without. The question is whether the presence of substantial monetary claims so alters the balance of interests as to raise a *constitutional* bar to mandatory class actions in some or all cases. Neither of respondents' arguments can justify such a constitutional rule.

With respect to respondents' "homogeneity" argument, the simple reason that it cannot justify opt-out rights for monetary claims is that the concern about homogeneity is fully addressed by the conceded requirement of adequacy of representation (along with the related requirements of commonality and typicality of claims). If monetary cases present a greater likelihood of divergence among the interests of class members, that only means that adequacy of representation is less likely to be found; and in such a case, the requirements for giving binding effect to a class action judgment will be lacking. But where adequacy of representation *is* found—as it was in this case—the concern about intra-class conflicts has necessarily been met, and there is no justification for holding that the Constitution precludes giving binding effect to the class-action judgment.

In other words, the requirement of adequate representation (with the related requirements of commonality and typicality) fully meets any constitutional concerns about heterogeneity among class members' interests. Opt-out

rights are wholly unnecessary to address such concerns, either for monetary or for non-monetary claims. With adequate representation assured, absent class members in a mandatory class action, regardless of the nature of their claims, have "the functional equivalent of a day in court." 7B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1786, at 195 (2d ed. 1986).[12]

With respect to respondents' "cohesion" argument, the reason that it cannot justify opt-out rights for monetary claims is that the *Constitution* does not demand so narrow a view of the interests that may be deemed to justify mandatory class actions. Respondents evidently assume that the current provisions of Rule 23, which are themselves the result of repeated evolution as circumstances have revealed new needs, must be rigidly construed and then frozen in place to meet the "fundamental fairness" standard of the Constitution's due process guarantee. *See Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985). But that assumption is groundless.

To the contrary, once adequate representation assures full protection of the interest of class members in the fair litigation of their claims, there is little if any benefit furnished by opt-out rights (even for monetary claims). On the other hand, there are weighty public and private

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[12] Public Citizen's *amicus* brief offers stark confirmation that it is adequacy of representation that is the real locus of inquiry into intra-class differences. Public Citizen bases both its argument that the class certification was improper (Br. 10-19) and its argument that the interests of respondents went unprotected (Br. 19-29) on the contention that respondents' interests conflicted with those of the named plaintiffs in MDL 633—that is, were not adequately represented. Indeed, Public Citizen ultimately acknowledges that it is really challenging the Ninth Circuit's finding of adequate representation. *Id.* at 25 n.8. That ruling is not challenged by respondents, however, and is not at issue in this Court. Once the finding of adequate representation is accepted, as it must be, there is nothing left to the notion that an opt-out right was constitutionally required to ensure fair treatment of respondents' claims in MDL 633.

interests supporting mandatory classes, independent of whether the class claims are "inherently cohesive" in some strictly defined sense. Both the judicial system and private litigants—defendants as well as other plaintiffs seeking prompt and fair adjudication in the courts—have strong interests in avoiding the wasteful proliferation of duplicative proceedings, with potentially inconsistent results, and unwarranted barriers to settlement. As a constitutional matter, those overriding interests are more than sufficient to justify binding an adequately represented class member to a class action judgment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 92-1988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TICOR TITLE INSURANCE COMPANY, *et al.*,

Petitioners,

v.

WALTER THOMAS BROWN and JEFFREY L. DZIEWIT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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A. Miller & D. Crump, *Jurisdiction and Choice of Law In Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1 (1986) 16-17

Note, *Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)*, 88 Yale L.J. 868 (1979) 8

7A C. Wright, A. Miller & M.K. Kane, *Federal Practice and Procedure* § 1776 (2d ed. 1986) 8

7B C. Wright, A. Miller & M.K. Kane, *Federal Practice and Procedure* §§ 1785, 1786 (2d ed. 1986) ... 11-12

Manual For Complex Litigation (1985) (Supplement to C. Wright, A. Miller & M.K. Kane, *Federal Practice and Procedure* (1969 - 1986)) 14-15

5 H. Newberg & A. Conte, *Newberg on Class Actions* § 24.106 (3d ed. 1993) 18

INTEREST OF THE *AMICUS CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nationwide civil rights organization that was formed in 1963 by leaders of the American Bar, at the request of President Kennedy, to provide legal representation to African Americans who were being deprived of their civil rights. The national office of the Lawyers' Committee and its local affiliates have represented the interests of African Americans, Hispanics and women in hundreds of class actions relating to employment discrimination, voting rights, equalization of municipal services, school desegregation, and housing discrimination. Over one thousand members of the private bar, including former Attorneys General, former presidents of the American Bar Association and other leading lawyers, have assisted the Lawyers' Committee in such efforts.

Throughout its thirty-year history, the Lawyers' Committee has filed class action cases designed to remedy systemic discrimination. Many of these cases have been certified as class actions pursuant to Federal Rule of Civil Procedure 23(b)(2). Since the Lawyers' Committee and its affiliates will continue to utilize class action litigation as a mechanism for remedying discrimination, the Lawyers' Committee has a strong interest in the adoption of legal principles that both safeguard the due process rights of individual class members and ensure that class actions can be used effectively in litigating claims that affect a large group of individuals.

The question presented in this case is whether due process requires that individual class members be given an opportunity to opt out of a suit brought under Fed. R. Civ. P. 23(b)(2) where there are class claims for monetary relief. The Ninth

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[1] The parties have consented to the filing of this brief. Letters of consent are being filed with the Clerk of the Court along with this brief, pursuant to Rule 37.3 of the Rules of the Court.

Circuit has held that the failure of a district court to permit class members to opt out amounts to a denial of due process and prevents any *res judicata* bar of those monetary claims. As the Lawyers' Committee will argue in this brief, due process does not require that class members be given an opportunity to opt out of class action litigation under Rule 23(b)(2) involving monetary claims.

STATEMENT OF THE CASE

In June 1986, a federal district court entered final judgment settling a series of class action lawsuits against six title insurance companies in which injunctive relief and damages were sought for alleged antitrust violations. *See In re Real Estate Title and Settlement Services Antitrust Litigation*, 1986-1 Trade Cas. (CCH) ¶ 67,149 (E.D. Pa. 1986) ("MDL 633"). Pursuant to the terms of the settlement, the defendant title insurers provided the plaintiff class, estimated at 3.4 million purchasers of title insurance, a package of benefits in exchange for the release of all federal and state price-fixing claims. The package included substantial injunctive relief and certain in-kind financial benefits; all damages claims were waived. Notice of the settlement was published on two occasions in each of thirty-six newspapers in the thirteen affected states, whose aggregate circulation equalled over 6¼ million.

In accepting the settlement, the district court certified the class under Rule 23(b)(1) and (b)(2). The court rejected objections to the settlement, including an attempt by the Arizona attorney general to opt out of the class. The court found that due process did not require that class members be notified of a right to opt out of the settlement or be permitted to opt out. Rather, the court found that the due process rights of absent class members were satisfied by the requirements

built into Rule 23, namely, that the class be adequately represented, notified of the proposed settlement, and that the court approve the settlement only if it was fair, adequate, and reasonable. *In re Real Estate*, 1986-1 Trade Cas. (CCH) ¶ 67,149, at 62,929. The State of Arizona, an objecting class member, appealed the MDL 633 final judgment. The Third Circuit affirmed, without opinion, the final judgment approving the settlement. *In re Real Estate Title and Settlement Services Antitrust Litigation*, 815 F.2d 695 (3d Cir. 1987). The State of Arizona filed a petition for *certiorari*, which was denied by this Court. *Arizona v. Chicago Title Insurance Co.*, 485 U.S. 909 (1988).

The present action was filed in the United States District Court for the District of Arizona as a collateral attack on the MDL 633 judgment. Two individual purchasers of title insurance in Arizona and Wisconsin filed an action on behalf of a class of purchasers from those states against the same title insurer defendants seeking injunctive and monetary relief for alleged federal antitrust violations. The defendants filed a motion for summary judgment on *res judicata* grounds; the district court granted the motion. Holding that the MDL 633 final judgment barred plaintiffs' claims, the district court rejected the plaintiffs' argument that under this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) ("*Shutts*"), they were denied due process because they were not given notice and an opportunity to opt out of the MDL 633 litigation to pursue their individual monetary claims.[2] In *Shutts*, this Court held that due process required such opt out procedures in a state court action adjudicating claims "wholly or predominately

[2] The district court also rejected plaintiffs' assertion that they were inadequately represented in the prior action. The Ninth Circuit affirmed this finding, and that issue is not before this Court.

for money judgments." *See id.* at 811 n.3. The district court distinguished *Shutts*, finding that the equitable character of the relief in MDL 633 brought it outside the reach of *Shutts*, and that the other procedures used by the MDL 633 court satisfied due process.

The Ninth Circuit reversed, holding that the due process analysis in *Shutts* controlled the instant action. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992). The Court of Appeals found that because the MDL 633 litigation foreclosed "substantial damage claims,"[3] it fell within the *Shutts* rule governing claims wholly or predominantly for money judgments. *Id.* at 392. The lower court noted that in order to bind absent class members concerning their monetary claims, minimal due process required that they be provided with an opportunity to opt out of the litigation. *Id.* The court then held that because the plaintiffs were not given the opportunity to opt out of the MDL 633 litigation, *res judicata* could not bar their damages claims against defendants. *Id.* However, the lower court did hold that the settlement in MDL 633 barred the plaintiffs from seeking further injunctive relief. *Id.*

After the title insurers' petition for rehearing was denied in March 1993, they sought review, in this Court, of the Ninth Circuit's reversal of the district court's grant of summary judgment in their favor.

[3] The Ninth Circuit adopted this finding from a subsequent Third Circuit ruling that reversed an injunction against a state court collateral attack on the MDL 633 settlement. *See In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 761, 768 (3d Cir. 1989).

SUMMARY OF ARGUMENT

Contrary to the decision of the lower court, due process does not require that notice and an opportunity to opt out be provided to absent class members in a class action certified under Fed. R. Civ. P. 23(b)(2) seeking substantial equitable and monetary relief. The extensive protections built into Rule 23 are sufficient to protect the due process rights of members of mandatory classes. A decision holding that class members have a constitutional right to notice and opt out of a properly certified Rule 23(b)(2) class would greatly and unnecessarily burden the use of (b)(2) proceedings as a viable means of litigating civil rights actions.

Such a decision would reduce the likelihood of settlements in civil rights class actions under Rule 23(b)(2) since defendants would be often unwilling to settle cases if there exists a threat of subsequent litigation by class members who have opted out. It would also make such actions prohibitively expensive and would impede the ability of class plaintiffs to secure the broad, class-wide relief widely used to combat unlawful discrimination. Finally, it would lead to collateral attacks on judgments in Rule 23(b)(2) cases entered after contested proceedings as well as court-approved settlements. Accordingly, to extend the due process holding of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) to classes seeking substantial equitable and monetary relief and properly certified under Rule 23(b)(2) is unwarranted both as a matter of constitutional law and sound public policy.

ARGUMENT

THE LOWER COURT ERRONEOUSLY APPLIED *SHUTTS* TO A RULE 23(b)(2) CLASS ACTION

A. Introduction

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) ("*Shutts*"), this Court painstakingly noted that its holding, involving the minimum due process required to bind an absent class member concerning a claim for money damages or similar relief at law,

> is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief.

472 U.S. at 811 n.3. In *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), the lower court, without any analysis, applied the *Shutts* notice requirements, including the right to opt out, to a case which had been certified as a mandatory, non-opt out class under Rule 23(b)(2). In so doing, the court below was in error.

The sole reason given by the lower court for holding *Shutts* applicable was the assertion that the litigation was a "hybrid suit" which involved "substantial damage claims" and that an absent class member's monetary claims could not be foreclosed by the judgment in that case because the class member had not been afforded the right to opt out. Viewed most narrowly, the decision is erroneous because there was no holding or determination, as required by *Shutts*, that the claims asserted by the class were "wholly or predominately for money judgments."

As made clear in the notes of the Advisory Committee, Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." 1966 Advisory Committee Notes, Amendments to Rules of Civil Procedure, 39 F.R.D. 73, 102. Thus, in certifying and maintaining the class under Rule 23(b)(2), the lower courts implicitly made and approved a finding inconsistent with the finding required by *Shutts*, *i.e.*, that the relief sought by the class did not relate exclusively or predominantly to money damages. The propriety of that certification has not been challenged before this Court, and this implicit but necessary finding should therefore be accepted by this Court.[4]

If, however, the lower court's holding is viewed more broadly, and the decision is read to require opt out notice to class members in all class actions involving claims for equitable and monetary relief properly certified under Rule 23(b)(2) (the issue that was expressly reserved in *Shutts*), the decision below is not only erroneous, but would also seriously affect class action litigation nationwide, especially civil rights litigation, and upset the finality of numerous judgments entered after contested proceedings as well as settlements in Rule 23(b)(2) class actions.

B. Civil Rights Class Actions And Established Practice Under Rule 23(b)(2)

Subdivision (b)(2) was added to Rule 23 in 1966, in part to make it clear that civil rights suits for injunctive or declaratory

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[4] There is no basis for believing that a Rule 23(b)(2) class which seeks "substantial money claims," along with substantial equitable relief, is necessarily seeking relief which is "wholly or predominately for money judgments." *Cf. Avagliano v. Sumitomo Shoji America, Inc.*, 107 F.R.D. 748, 750 (S.D.N.Y. 1985).

relief can be brought as class actions. Rule 23(b)(2) has proven to be highly effective in meeting the challenges posed by this type of litigation. This success stems from the fact that the class suit is a uniquely appropriate procedure in civil rights cases, which generally involve an allegation of discrimination against a group as well as the violation of rights of particular individuals. 7A C. Wright, A. Miller & M. K. Kane, *Federal Practice and Procedure* § 1776, at 495-96 (2d ed. 1986). Rule 23(b)(2) has been invoked in a wide range of civil rights contexts, including suits arising out of alleged race and sex discrimination in employment, in school and housing desegregation suits, and in actions challenging public welfare statutes or regulations as discriminatory. *Id.* (*See* illustrative civil rights cases collected therein.)

While the text of Rule 23(b)(2) appears primarily to be directed at class actions seeking final injunctive or declaratory relief, the subdivisions of Rule 23 are not mutually exclusive. For example, under Title VII, 42 U.S.C. §§ 2000e to 2000e-17, it has generally been held that individual back pay awards for absent class members can be sought in a Rule 23(b)(2) class action. *See, e.g., Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 256-57 (5th Cir. 1974); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 408-25 (1975). *See generally* Note, *Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)*, 88 Yale L.J. 868 (1979); *cf. Senter v. General Motors Corp.*, 532 F.2d 511, 525 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976) ("primary prayer was for injunctive relief and the additional request for back pay does not preclude certification as a 23(b)(2) class action").

One of the primary justifications for permitting claims for Title VII back pay awards under Rule 23(b)(2) arises from the Advisory Committee's statement that (b)(2) does not extend "to

cases in which the appropriate final relief relates exclusively or predominantly to money damages." 1966 Advisory Committee Notes, Amendments to Rules of Civil Procedure, 39 F.R.D. at 102. In this regard, courts have generally held that Title VII back pay awards are not in the nature of monetary damages, but rather constitute equitable pecuniary relief. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. at 417 ("the court's discretion [to award back pay] is equitable in nature"); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) ("The back pay award is not punitive in nature, but equitable—intended to restore the recipients to their rightful economic status absent the effects of the unlawful discrimination . . . . [B]ack pay, as one element of the equitable remedy, conflicts in no way with the limitations of Rule 23(b)(2).")[5]

Thus, Rule 23(b)(2) class actions often involve either (a) class claims for both equitable injunctive and equitable monetary (*i.e.*, back pay) relief, or (b) claims for equitable or declaratory relief combined with claims for legal damages, but only where such "final relief . . . [does not relate] exclusively or predominantly to money damages." 1966 Advisory Committee Notes, 39 F.R.D. at 102; *see Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 780 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986) ((b)(2) class actions are not limited to equitable or declaratory relief, but may also include incidental damages claims). It is respectfully submitted that insofar as a class is properly certified under and meets the express require-

[5] As the 1966 Advisory Committee Notes indicate, "[s]ubdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential." 39 F.R.D. at 102.

ments of Rule 23(b)(2) (or (b)(1)), due process does not require absent class members to be afforded the right to opt out of such a dual purpose mandatory class.

C. Established Rule 23(b)(2) Procedures Fully Protect The Due Process Rights Of Absent Class Members

The courts have generally held that class members in Rule 23(b)(1) and Rule 23(b)(2) actions have no due process right to exclude themselves from such actions as is true in Rule 23(b)(3) actions. *See, e.g., Penson v. Terminal Transport Co.*, 634 F.2d 989, 994 (5th Cir. 1981); *see also Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981) (due process does not require that unnamed class plaintiff be given right to opt out of Rule 23(b)(2) class action); *Robertson v. National Basketball Ass'n.*, 556 F.2d 682, 685-86 (2d Cir. 1977) (preclusion of right to opt out of a Rule 23(b)(1) settlement does not violate due process).

As previously noted, in *Shutts* this Court did not hold that the due process notice and opt out rights referred to in that case were applicable to (b)(1) or (b)(2) classes. This is consistent with *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 n.14 (1974), where this Court carefully laid aside the question of what notice, if any, might be necessary in favor of a (b)(1) or (b)(2) class's absent members. Indeed, in *Sosna v. Iowa*, 419 U.S. 393, 396 n.4 (1975), the Court indicated quite plainly that since the suit therein sought injunctive and declaratory relief, but not monetary relief, "the problems associated with a Rule 23(b)(3) class action, which were considered by the Court last term in [Eisen]" did not exist. *Id.*; *see also United States v. Allegheny Ludlum Indus., Inc.*, 517 F.2d 826, 875-79 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

The provisions of Rule 23 relating to 23(b)(2) classes provide more than adequate protections for the due process interests of absent class members. First, in considering the very question of certification, courts have the responsibility to determine that the class claims arise out of conduct which has affected all of the class members in a manner that makes class-wide relief appropriate. 7B C. Wright, A. Miller & M. K. Kane, *Federal Practice and Procedure* § 1785, at 103-04 (2d ed. 1986). This ensures that the members of the class share common, if not identical, claims against the defendant. *See, e.g., Taylor v. White*, 132 F.R.D. 636, 648-49 (E.D. Pa. 1990). Thus, it is unlikely that there will be special defenses or issues relating to individual members of a (b)(1) or (b)(2) class. Further, a judgment in the action will afford each member of the class appropriate relief. *See, e.g., Lloyd v. City of Philadelphia*, 121 F.R.D. 246, 251 (E.D. Pa. 1988).

Second, before a class is certified, the court also has the responsibility to ensure that the absent class members will be adequately represented by the named plaintiffs. This includes an examination of the adequacy of the named plaintiffs, an inquiry into any potential conflicts among the class members, and the adequacy of counsel acting on behalf of the class. *See, e.g., Probe v. State Teachers' Retirement Sys.*, 780 F.2d at 780-81. These protections further ensure the identity of interests among class members and that the claims of absent class members are being fully and effectively represented.

> Thus, in suits under subdivisions (b)(1) and (b)(2), once the court determines that the members are adequately represented as required by Rule 23(a)(4), it is reasonably certain that the named representatives will protect the

> absent members and give them the functional equivalent of a day in court.

7B C. Wright, A. Miller & M. K. Kane, *Federal Practice and Procedure* § 1786, at 195 (2d ed. 1986); *see also Larionoff v. United States*, 533 F.2d 1167, 1186 n.44 (D.C. Cir. 1976), *aff'd on other grounds*, 431 U.S. 867 (1977).

In addition to judicial determination of the adequacy of class representation in a non-opt out class, the class's interests are further protected by Rule 23's provision that the court may issue orders requiring "for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such a manner as the court may direct to some or all of the members at any step in the action . . . ." Fed. R. Civ. P. 23(d)(2).[6] Depending upon the facts peculiar to the case, this provision of the Rule provides the court with ample flexibility to meet the due process interests of absent class members that may arise in any (b)(1) or (b)(2) class action. For example, under subdivision (d)(2) of Rule 23, the district court has discretionary power to require that, in appropriate circumstances, an opt out right and notice thereof be given, should the court determine that such a right is desirable to protect the interests of the absent class members. *Penson v. Terminal Transport Co.*, 634 F.2d at 994; *Bauman v. United States District Court*, 557 F.2d 650, 659-60 (9th Cir. 1977); *cf. County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1303 (2d Cir. 1990) (while under Rule 23(b)(1) and (b)(2) there is no absolute right to opt out, as there is under Rule 23(b)(3), courts have discretionary power to allow exclusion).

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[6] As stated in the 1966 Advisory Committee notes, "[i]n the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum." 39 F.R.D. at 106.

Where a (b)(2) or other type of class action is settled, Rule 23(e) requires that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Since the settlement will be binding on class members, the court has a fiduciary obligation to the class in evaluating the fairness, reasonableness and overall adequacy of the relief provided in the settlement. *See, e.g., Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975); *Greenfield v. Villager Indus.*, 483 F.2d 824, 832 (3d Cir. 1973). Where a class settlement has been negotiated prior to certification of the class, the court will subject such a settlement to a higher degree of scrutiny than is usual in assessing a settlement's fairness. *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d at 1295.

As long as the standards for adequacy of class representation laid down in *Hansberry v. Lee*, 311 U.S. 32 (1940), have been met, a judgment in a dual purpose class action properly certified under 23(b)(2) should bind absent class members, even without prior notice. Indeed,

> [i]f an unnotified plaintiff of the class could thus be bound by an adverse class action judgment [in a (b)(2) class action], it followed that due process did not require receipt of a pre-judgment opportunity to opt out.

Kyriazi v. Western Electric Co., 647 F.2d 388, 393 (3d Cir. 1981).

In light of Rule 23's extensive built-in judicial safeguards to prevent abuse or unfairness to absent class members, which have worked well since 1966, there is no reasonable basis for rewriting the Rule to provide, as did the lower court, that

absent class members in a Rule 23(b)(2) class action involving a claim for substantial monetary relief must be afforded the due process right to opt out of the class.

D. Practical Considerations In Assessing The Notice Requirements In Rule 23(b)(2) Class Actions

Over the years since 1966, courts have developed practical experience in fairly and effectively managing class actions under Rule 23(b)(2) involving both injunctive and equitable or incidental monetary claims. For example, the *Manual For Complex Litigation* (1985) (Supplement to C. Wright, A. Miller & M.K. Kane, *Federal Practice and Procedure* (1969-1986)) provides guidance for the conduct of employment discrimination class actions. It expressly notes that such cases are frequently brought as class actions under (b)(2) on the basis that the defendant "has acted . . . on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the class as a whole." *Id.* at § 33.52, p. 322.

> Absent unusual circumstances, the trial of an employment discrimination class action should be conducted in separate stages under Fed. R. Civ. P. 42(b). At "stage I," the court determines whether the defendants have discriminated against the class. If class-wide discrimination is found, the court next considers the appropriateness of class-wide injunctive relief and then . . . resolves claims for back pay and other individual relief by the various class members. In this second stage, the claimants —who, by proof of their membership in the class, are presumed to have been subjected to the discrimination practiced against the class—

> are permitted to present their individual claims of injury . . . .

Id. at § 33.54, pp. 330-31. *Cf. International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361 (1977). In extreme circumstances, the court may permit opt outs during stage II proceedings. This, however, should not be routinely done. "Class members are sometimes permitted at this point to opt out of further proceedings in the case to pursue back pay claims in separate actions; this practice however, may lead to a proliferation of individual cases and frustrate later efforts to settle the litigation." *Manual for Complex Litigation*, at 330, n.130.[7]

Thus, in a typical employment discrimination class action under Title VII involving both injunctive and back pay relief certified under Rule 23(b)(2), if there is a class-wide finding of liability during stage I of the proceedings, the absent class members, under Rule 23(d)(2), would normally be provided with notice and the opportunity to present their individual monetary claims for back pay so that they may participate in stage II. In this way, the class members' rights to individual monetary relief are both protected and vindicated. If, however, the (b)(2) class's monetary and injunctive claims are settled, the absent class members, under Rule 23(e), would be provided with appropriate notice of that settlement, but they would not have a due process right to be excluded from its binding effect.

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[7] In *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1554 (11th Cir.), *cert. denied*, 479 U.S. 883 (1986), the court held that absent class members must be afforded the right to opt out of a 23(b)(2) Title VII class action at Stage II (the monetary relief stage) of the proceeding. Because Rule 23(b)(2) procedures provide adequate due process protections and because such an absolute opt out right would tend to defeat settlement efforts, the Lawyers' Committee urges that the ability to opt out of a 23(b)(2) class action remain a matter of sound judicial discretion.

> The due process clause of the Constitution is satisfied when a Rule 23(b)(2) class action is settled without providing objectors a means of opting out because the objectors are (1) adequately represented by the named plaintiffs, (2) represented by an attorney who is qualified, (3) provided with notice of the proposed settlement, (4) given an opportunity to object to the settlement, and (5) assured that the settlement will not take effect unless the trial judge—after analyzing the facts and law of the case and considering all objections to the proposed settlement—determines it to be fair, adequate and reasonable.

Kincade v. General Tire and Rubber Co., 635 F.2d 501, 507-08 (5th Cir. 1981). *See also Robertson v. National Basketball Ass'n*, 556 F.2d at 685-86.

E. Policy Considerations Supporting Mandatory Classes

If the lower court's decision is read to require that an absent class member be afforded the right to opt out before being foreclosed from asserting a substantial claim for monetary relief, such affirmance would ban virtually all mandatory classes certified under Rule 23(b)(1) as well as most dual purpose classes under Rule 23(b)(2). However, mandatory (non-opt out) classes have long been judicially recognized and find historical precedent in the equitable bill of peace which developed as a procedure to prevent multiple suits concerning common questions, particularly those in which many people made claims to the same property or fund, by consolidating them in a single suit in equity. A. Miller & D. Crump, *Jurisdiction and Choice of Law In Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 40 (1986).

By definition, it is impossible to resolve separately individual claims involving common rights or limited funds, *see, e.g., Hartford Life Insurance Co. v. Ibs*, 237 U.S. 662 (1915), or group challenges to, for example, a statutory provision regarding military re-enlistment bonuses, *Larionoff v. United States*, 365 F. Supp. 140 (D.D.C. 1973), *aff'd and remanded on other grounds*, 533 F.2d 1167 (D.C. Cir. 1976), *aff'd on other grounds*, 431 U.S. 864 (1977). In each of these situations, as well as in most other Rule 23(b)(1) mandatory classes, a unitary decision is crucial and the right to opt out would defeat this purpose.

Similarly, the need for a unitary decision in a (b)(2) class action is equally compelling. Where the sole relief sought is equitable, such as a general injunction, it is self-evident that absent class members should not be afforded the right to opt out so that they may litigate their right to subject the defendant to different or inconsistent general injunctive obligations. The presence in a (b)(2) class action of claims for equitable monetary relief (back pay), incidental damages, or damages that are fixed or calculable according to some formula,[8] should not affect the right to notice or opt out under Rule 23(b)(2). Of course, should the relief sought relate wholly or predominantly to monetary damages at law, the action should be certified under Rule 23(b)(3) and not (b)(2), thus affording absent class members with notice and the right to opt out as provided in Rule 23(c)(2).

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[8] Examples of monetary relief provided by the Advisory Committee in its 1966 Notes to Rule 23(b)(2) include damages which may be computed according to some uniform or fixed formula. 39 F.R.D. at 102.

If notice and the opportunity to opt out are required in every (b)(2) action involving monetary relief, many class actions would simply not be brought because of the prohibitive costs of providing such notice. Quite apart from shouldering the burden of providing notice to the entire class, plaintiffs and class members in civil rights cases, in particular, are already hard-pressed to find the resources to pursue their individual claims. As a result, civil rights enforcement would be greatly diminished and a substantial number of class members would be unable to pursue valid monetary claims. As this Court has observed,

> Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).

In addition, a procedure requiring an opportunity to opt out may weaken the ability of class members to vindicate their rights. Class members' fear of retaliation by defendants—whether well-founded or not—would seriously undermine the use of the class action device to enforce effectively the civil rights laws and to carry out the intent of Congress. *Cf.* 5 H. Newburg & A. Conte, *Newburg on Class Actions* § 24.106, at 24-354 (3d ed. 1993) (empirical evidence demonstrates that fear of reprisals deterred victims of discrimination from participating in class actions).

Another policy consideration militating in favor of the mandatory nature of dual purpose classes under Rule 23(b)(2) is the strong public policy in favor of the settlement of claims.

This Court has held that this policy is particularly important in the resolution of cases brought under Title VII because of the "strong preference" of Congress for "encouraging voluntary settlement of employment discrimination claims." *Carson v. American Brands*, 450 U.S. 79, 88 n.14 (1981).

Decisions emphasizing the preferred role of settlements under Title VII are legion. *Luevano v. Campbell*, 93 F.R.D. 68, 85 (D.D.C. 1981) (*see also* cases cited therein). The court in *Luevano*, approving a consent decree in a class employment discrimination action challenging the use of an employment test, noted that all parties in the litigation had an interest "in eliminating any danger of conflicting remedial orders arising from the prosecution of other cases by class members . . . [which] is a reasonable and proper basis for the provisions of the Consent Decree binding all class members to the relief provided by the settlement." *Id.* at 93.

Such a vital interest would be ignored, and the parties' reasonable expectations and reliance on the provisions of duly entered class action judgments in dual purpose Rule 23(b)(2) class actions, especially civil rights actions, would be rendered useless if absent class members with claims for monetary relief were permitted to attack collaterally such duly entered judgments simply and solely because they were not afforded the right to opt out. Due process does not require such a result, nor does this Court's holding in *Shutts*. Because the lower court's decision on review here mandates impermissible collateral attacks on judgments duly entered in Rule 23(b)(2) (and (b)(1)) class actions, it should be reversed.

As a final matter, the Lawyers' Committee is aware of issues that may arise in civil rights class actions which not only contain injunctive and equitable monetary claims, but also class claims for damages at law under a variety of civil rights

statutes. Separable claims at law for general damages under these statutes should normally be certified under Rule 23(b)(3). The fact that such general damage claims are joined with equitable (b)(2) claims should not be used to deny class members their due process rights to notice and opt out afforded to Rule 23(b)(3) class members by Rule 23(c)(2).

In such circumstances, the Lawyers' Committee would urge that injunctive and equitable monetary claims should be certified under Rule 23(b)(2), while the class's legal claims, such as for mental and emotional distress, should be separately certified under Rule 23(b)(3). In this way, the mandatory nature as well as the benefits of a Rule 23(b)(2) injunctive and back pay class would be preserved, thus ensuring consistent and coherent equitable relief, while at the same time, the class would be afforded the opportunity to recover compensatory damages, consistent with the due process safeguards of Rule 23(b)(3).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TICOR TITLE INSURANCE COMPANY, ET AL.,
Petitioners,
v.
WALTER THOMAS BROWN AND JEFFREY L. DZIEWIT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL FOOTBALL LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a federal court may refuse to enforce a prior federal class action judgment, properly certified under Rule 23, on the ground that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf.

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In re Real Estate Title & Settlement Services Antitrust Litigation, 1986-1 Trade Cas. (CCH) ¶ 67,149 (E.D. Pa. 1986), *aff'd*, 815 F.2d 695 (3d Cir. 1987), *cert. denied*, 485 U.S. 909 (1988)	29n
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King v. South Central Bell Telephone & Telegraph Co., 790 F.2d 524 (6th Cir. 1986)	23n, 25n, 29n
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Powell/McNeil v. National Football League, 764 F. Supp. 1351 (D. Minn. 1991)	6
Probe v. State Teachers' Retirement System, 780 F.2d 776 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986)	23n
Reynolds v. National Football League, 584 F.2d 280 (8th Cir. 1978)	23n
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Robertson v. National Basketball Ass'n, 556 F.2d 682 (2d Cir. 1977)	19, 23n, 26
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Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978)	14n

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Specialty Cabinets & Fixtures, Inc. v. American Equitable Life Insurance Co., 140 F.R.D. 474 (S.D. Ga. 1991)	26
United States v. Brown University, 1993-2 Trade Cas. (CCH) ¶ 70,358 (3d Cir. 1993)	14n
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Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975)	20n, 23, 26
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OTHER AUTHORITIES:	
Amendments to Rules of Civil Procedure, 39 F.R.D. 69 (1966)	22n
Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39 (1967)	20n
3B James W. Moore & John E. Kennedy, *Moore's Federal Practice* ¶ 23.31[3] (1993)	27n
1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* §§ 1.19, 4.20, 5.40 (3d ed. 1992)	22n, 27n, 29n
7A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1772 (2d ed. 1986)	27n
7B Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1789 (2d ed. 1986)	22n

INTEREST OF THE NATIONAL FOOTBALL LEAGUE

Having obtained written consent of the parties pursuant to Rule 37.2 of the Rules of this Court,[1] the National Football League (the "NFL" or the "League") respectfully submits this brief as *amicus curiae* in support of the Petitioners.

The Ninth Circuit's decision below may be read as holding that, as a matter of due process, opt-out rights must be accorded to absent class members in all class actions asserting claims for damages. *See Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992). The NFL has a substantial interest in the constitutionality of mandatory non-opt-out class actions certified pursuant to Federal Rules of Civil Procedure 23(b)(1) and (b)(2), particularly when the claims in such actions are predominantly for injunctive relief.

Currently, there are pending before the United States Court of Appeals for the Eighth Circuit six appeals from the district court's approval of a mandatory non-opt-out class action settlement in *White v. National Football League*, Civ. No. 4-92-906 (D. Minn.). The *White* settlement will finally bring to an end a bitter, six-year labor dispute between the NFL and its player-employees. This prolonged dispute has been marked at various stages by a work stoppage, the purported abandonment by the NFL players' union of its collective bargaining rights, numerous and repeated lawsuits, including a three-month jury trial that resulted in an ambiguous verdict, and the prospect of years of further litigation and uncertainty with respect to the League's player employment practices. The allowance of opt-out rights and the consequent potential maintenance of

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[1] The letters of consent have been filed with the Clerk of this Court.

individual damage actions, approximately thirty of which are already pending, including a purported class action that seeks both damages and an injunction precluding compliance with the settlement agreement, would have rendered impossible the singular and overriding goal of the League and its players in seeking a settlement – the achievement and maintenance of a prolonged period of "labor peace" after years of bitter labor strife.

The settlement agreement, which was implemented in March 1993, has completely restructured the player employment practices in the NFL. The agreement also commits the League to make settlement payments in the amount of $115 million to class members. However, because of the vital importance of binding all class members to the settlement and in light of the unprecedented decision of the Ninth Circuit below, the agreement grants the NFL the option to terminate the settlement agreement in the event the mandatory non-opt-out class is found impermissible.[2]

Among the issues on appeal in *White* is the district court's decision to certify a mandatory non-opt-out settlement class pursuant to Rule 23(b)(1), and its determination that individual members of that class do not have a constitutional due process right to opt out of the settlement and maintain their own actions for damages and injunctive relief.

Accordingly, the NFL has a vital interest in having this Court reaffirm the constitutional viability of Rule 23(b)(1) and (b)(2) mandatory class actions in cases involving both injunctive and damage claims.

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2 Alternatively, the League has the option, under a separate side-letter agreement submitted to the court, to extend the term of the settlement in the event the mandatory non-opt-out class is found impermissible.

SUMMARY OF ARGUMENT

The history of the NFL's labor dispute with its players that culminated in the class action settlement in *White*, together with the procedural safeguards employed therein to protect the interests of absent class members, demonstrates that the Ninth Circuit's decision is overbroad and incorrect. The decision below: (i) adopts unwarranted and unprecedented new standards of due process where claims for injunctive relief predominate over claims for monetary relief; (ii) if affirmed, would render unconstitutional all mandatory federal class actions involving damage claims, thereby invalidating Federal Rules 23(b)(1) and (b)(2) in a large number of cases; and (iii) severely undermines the practical utility and policy goals of the Rule 23 mechanism. Accordingly, the Ninth Circuit's decision should be reversed.

ARGUMENT

I. THE HISTORY OF THE *WHITE* CASE, TOGETHER WITH THE PROCEDURAL SAFEGUARDS EMPLOYED THEREIN, DEMONSTRATES THAT THE NINTH CIRCUIT'S DECISION IS OVERBROAD AND INCORRECT

The NFL respectfully submits that the procedural safeguards employed by the district court in evaluating and ultimately approving the mandatory class action settlement in *White* were in complete accord with minimum due process requirements. In short, the *White* case illustrates how a mandatory non-opt-out class action involving both injunctive and damage claims can properly be maintained consistent with the fair treatment of absent class members.

The mandatory class settlement in *White* provides a useful illustration not only of why mandatory class actions are "fair," but also why they are "necessary" in so many instances. The labor dispute between the NFL clubs and the NFL players could not, and would not, have been settled but for the availability of the mandatory class action mechanism provided under Rule 23. Quite simply, the League's primary, if not singular, purpose in agreeing to the class action settlement was that through a single, binding resolution of all injunctive and damage claims, the bitter labor strife that had marked the League's operations for nearly six years would finally come to an end. Any arbitrary rule barring mandatory classes would not only have precluded the global "labor peace" that the *White* mandatory class settlement has achieved, but also would have unnecessarily subjected the federal court system to many more years of needless and wasteful litigation and the likelihood of inconsistent adjudications.

The class action settlement in *White* grew out of, and, if affirmed on appeal, will finally resolve a nearly six-year labor dispute between NFL clubs and NFL players, which focuses primarily on the parties' conflicting views with regard to the issue of veteran free agency. The players desired complete free agency, which would have permitted every NFL player to offer his services to every NFL team upon expiration of his contract. The NFL, on the other hand, believed that the need to maintain competitive balance, and thereby to make the NFL's entertainment product more attractive to consumers, required that there be reasonable restrictions on a veteran player's mobility so that the best NFL players would not flock to the more attractive markets or to the better quality teams. Thus, from the beginning,

this dispute has been about the nature and structure of the NFL's player employment practices.

Prior to the 1987 football season, the parties attempted unsuccessfully in collective bargaining negotiations to reach agreement on an acceptable compromise of the free agency issue. On September 22, 1987, the National Football League Players Association (the "NFLPA") — the exclusive collective bargaining representative of the NFL players — declared a strike. The strike failed to produce a compromise, however, and upon returning to work on October 15, 1987, the players filed *Powell v. National Football League*, Civ. No. 4-87-917 (D. Minn.) — a mandatory class action lawsuit alleging that the League's continued imposition of its earlier collectively bargained free agency system, as well as various other collectively bargained employment practices, violated the antitrust laws.

The district court certified a mandatory non-opt-out class action for injunctive relief and damages. *See Powell v. National Football League*, 711 F. Supp. 959, 966-69 (D. Minn. 1989). However, in November 1989, after more than two years of litigation, the Court of Appeals for the Eighth Circuit rendered the *Powell* lawsuit a virtual nullity when it determined that, because the challenged employment rules at issue had been "conceived in an ongoing collective bargaining relationship," the players' challenge was precluded by the nonstatutory labor exemption to the antitrust

laws. *Powell v. National Football League*, 930 F.2d 1293, 1303 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).[3]

Immediately following the Eighth Circuit's decision in *Powell*, the NFLPA took various steps purportedly designed to end its collective bargaining relationship with NFL clubs and for the express purpose of terminating the labor exemption. Over the next three years leading up to the mandatory class action settlement in *White*, approximately thirty separate lawsuits, many of which were funded by the NFLPA, were filed by individual and groups of NFL players in fifteen federal and state courts across the country.

Principal among these cases was a lawsuit titled *McNeil v. National Football League*, Civ. No. 4-90-476 (D. Minn.). The *McNeil* case challenged the legality of the League's Plan B veteran player reservation system – a less restrictive version of the veteran player reservation system set forth in the 1977 and 1982 collective bargaining agreements. In May 1991, the district court held that the NFLPA's actions had been sufficient to end the labor relationship between the NFLPA and the NFL clubs, and thus that such actions had effectively terminated the nonstatutory labor exemption. *Powell/McNeil v. National Football League*, 764 F. Supp. 1351, 1355-59 (D. Minn. 1991). This ruling cleared the way for a trial on the merits.

The *McNeil* case was ultimately tried to verdict before a jury in a ten-week trial in the summer of 1992. Responding

3 The Minnesota district court later decertified the mandatory class and dismissed the case. *Powell v. National Football League*, 773 F. Supp. 1250 (D. Minn. 1991). The Eighth Circuit's decision on the NFL's appeal is being held in abeyance pending the resolution of the *White* appeal. *Powell v. National Football League*, No. 91-3430MN (8th Cir.).

on a Special Verdict Form, the jury found that: (1) Plan B "had a substantially harmful effect on competition in the relevant market for the services of professional football players"; (2) Plan B "significantly contribute[s] to competitive balance in the NFL"; and (3) Plan B was "more restrictive than reasonably necessary to achieve . . . competitive balance." *See McNeil v. National Football League*, 1992-2 Trade Cas. (CCH) ¶ 69,982, at 68,769 (D. Minn. 1992).[4] The jury also found that at least one of the plaintiffs had suffered antitrust injury and, in awarding damages only to four of the eight plaintiffs in the total amount of $543,000 (before trebling), rejected the damage formula proferred by the plaintiffs. *See id.* The jury's damage award demonstrates that a formulaic approach to proving damages is not feasible, and that in the absence of a single settlement, separate litigation of all damage claims would have been required.

After the verdict, both sides claimed victory. The League claimed that the verdict demonstrated that it was entitled to a system of veteran player reservation rules to protect its

4 Significantly, however, the district court had instructed the jury that it was the defendants' burden to prove that there existed no significantly less restrictive alternatives to Plan B. In later approving the terms of the *White* class action settlement, the district court specifically identified this instruction as one of several "significant issues for appellate review." The district court also listed: (i) the scope of the nonstatutory labor exemption; (ii) the application of the rule of reason under Section 1 of the Sherman Act; (iii) the court's jury instructions regarding antitrust injury; and (iv) its determination with regard to the League's "single entity" defense. *See White v. National Football League*, 822 F. Supp. 1389, 1418 (D. Minn. 1993) ("*White I*"); *White v. National Football League*, No. 4-92-906, 1993 U.S. Dist. LEXIS 14570, at *24 (D. Minn. Aug. 19, 1993) ("*White II*").

legitimate business interest in competitive balance, and that not all NFL players were injured by the NFL's Plan B player reservation system. The players claimed that the verdict established their right to free agency and that all players were injured, if not damaged, by Plan B.

Less than two weeks after the *McNeil* jury verdict, the class plaintiffs filed *White v. National Football League*, Civ. No. 4-92-906 (D. Minn.). The complaint originally sought only antitrust injunctive relief but was later amended to include a class action claim for damages stemming from the challenged NFL player employment practices.[5] In October, 1992, plaintiffs in *White*, as well as the plaintiffs in *McNeil*, moved for an injunction that would have barred defendants from enforcing the Plan B player reservation system, or imposing any other player reservation system, on veteran NFL players whose contracts were to expire on February 1, 1993.

Against this backdrop of numerous and varied litigations, pending post-trial motions in *McNeil*, injunction motions in *McNeil* and in *White*, and the certainty of an appeal involving "complex and difficult" and "significant issues for appellate review," on January 6, 1993, the parties reached an agreement in principle to settle the *White* case, and a wide range of related litigation. The settlement was the result of extensive arm's length negotiations between class counsel and the League. In order to facilitate their agreement to settle, the district court conditionally certified a mandatory settlement class pursuant to Rule 23(b)(1) in separate orders dated January 6, and February 17, 1993.

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5 Among the player employment practices challenged by the class were the Plan B veteran player reservation system, the college draft, the NFL Player Contract, and preseason pay rules.

White I, 822 F. Supp. at 1395; *White II*, 1993 U.S. Dist. LEXIS 14570, at *6. In the words of the district court:

> Those mandatory class certification orders have provided a vehicle for the settlement of, among other things, all player challenges to the Plan B veteran player reservation rules, the college draft and the preseason pay rules. The settlement is the critical step toward the final resolution of the longstanding dispute between the NFL clubs and their player-employees.

White I, 822 F. Supp. at 1395.

On February 26, 1993, plaintiffs and defendants in *White* signed a Stipulation and Settlement Agreement, which was designed to bring an end to that litigation and to a wide range of related cases. By order of the same date, the district court preliminarily approved the proposed settlement as fair, reasonable, and adequate, and ordered that notice of the proposed settlement be provided to all class members.[6] These notices, approved by the court, described the settlement and informed all class members that a hearing would be held to determine whether the proposed settlement was fair, reasonable, and adequate. The notices also informed the class members that they had a right to submit written objections and to appear at the settlement hearing, in person or by counsel, to be heard in support of, or in opposition to,

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6 In all, approximately 5,300 notices were mailed to potential class members, including current or former NFL players and graduating college players. Of these, a total of 458, or less than ten percent, were returned as undeliverable. Of the 458 returned notices, 300 were remailed to newly located addresses. *See White I*, 822 F. Supp. at 1400.

the settlement, or to make any other statement of their position with respect to the settlement.

The settlement itself represented a compromise on a wide array of issues. For the players, the settlement agreement provided a system of unrestricted free agency for players with at least four or five years of accrued service in the League (depending on whether a League-wide "cap" on salaries becomes effective). Thus, the players achieved one of their principal and overriding objectives. The League also was able to protect its interest in competitive balance by preserving the college draft, limiting the number of players that could be either "unrestricted" free agents or "restricted" free agents (subject to their existing team's right to match another team's offer to the player), securing a League-wide cap on salaries and the amount of money to be paid to "untested" rookies, and limiting the number of veteran free agents that the League's "better" teams may sign.

Other provisions of the settlement agreement, although setting forth formal structural relief, in reality provided a monetary benefit to the players. These provisions included, among others: (i) increases in minimum salaries applicable to rookie and veteran players; (ii) League-wide and team "guarantees" in the percentage of revenues to be paid to players in the event a "salary cap" comes into existence; and (iii) various modifications to the NFL Player Contract, including a prohibition on payment of uniform preseason wages. Finally, the settlement also called for a $115 million payment, which is to be distributed directly to class members through a settlement distribution formula. *White I*, 822

F. Supp. at 1412-16; *White II*, 1993 U.S. Dist. LEXIS 14570, at *43-53.[7]

In the weeks following preliminary court approval, 73 NFL players (out of an identifiable class of approximately 5,000 players), 16 college players, one attorney-agent, and one NFL member club (the Philadelphia Eagles) filed objections to the proposed settlement on various grounds. All such objectors and/or their counsel were given a full and fair opportunity to voice their objections to the proposed settlement, including the opportunity to produce witnesses subject to cross-examination and to offer exhibits, at a formal court hearing on the fairness, reasonableness, and adequacy of the proposed settlement.

A number of these objectors specifically objected to the maintenance of a mandatory class under Rule 23(b)(1), arguing that they had a due process right to opt out of the settlement to pursue individual damage claims. Indeed, several such objectors went so far as to object to the monetary portion of the settlement by offering expert testimony regarding their claimed damages in comparison to their proposed recovery under the settlement.

Several of the "opt-out" objectors were also seeking injunctive relief which would have invalidated their existing

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7 In this regard, the *White* case is distinguishable from the facts of the case below. In *White*, the district court was able to balance the fairness of a $115 million settlement fund with the likely value of the class' damage claims generally, and the individual objectors' claims in particular. In the case below, the settlement was exclusively injunctive in nature and did not contain any provision for direct monetary payment to the class members. Indeed, the district court in *White* relied on this complete absence of identifiable monetary recovery for the absent class members as a ground for distinguishing the Ninth Circuit's decision below. *See White I*, 822 F. Supp. at 1412; *White II*, 1993 U.S. Dist. LEXIS 14570, at *38 n.31.

player contracts. Such relief would have been contrary to the terms of the *White* settlement agreement. Still another "opt-out" case, filed in the United States District Court for the Eastern District of Louisiana and purporting to be a mandatory class action for damages, also sought to have the settlement agreement set aside as violative of the antitrust laws. In all, at the time the *White* settlement received court approval, there were seventeen separate lawsuits pending in various federal district courts around the country in which individual objectors purported to challenge the same set of player employment rules at issue in *White*.[8] In addition, through the mandatory class mechanism, the NFL was also

[8] *See Hurst v. National Football League*, No. 92-3263 (E.D. La.); *Hurst v. National Football League*, No. 93-0766 (E.D. La.); *Dusbabek v. National Football League*, No. 4-93-126 (D. Minn.); *Lee v. National Football League*, No. 4-93-125 (D. Minn.); *McMillian v. National Football League*, No. 4-93-99 (D. Minn.); *Wright v. National Football League*, No. 4-93-124 (D. Minn.); *Jones v. National Football League*, No. 92-2512 (C.D. Cal.); *Sanders v. National Football League*, No. 92-4365 (C.D. Cal.); *Matthews v. National Football League*, No. 92-4370 (C.D. Cal.); *Hunter v. National Football League*, No. 92-4373 (C.D. Cal.); *O'Neal v. National Football League*, No. 92-4368 (C.D. Cal.); *Allen v. National Football League*, No. 92-7536 (C.D. Cal.); *Norton v. National Football League*, No. 93-0029 (C.D. Cal.); *Harper v. National Football League*, No. 4-93-314 (D. Minn); *Risien v. National Football League*, No. 4-93-182 (D. Minn.); *Duncan v. National Football League*, No. 93-1481 (C.D. Cal.); *Evans v. National Football League*, No. 92-878 (D. Ariz.).

able to settle 11 other pending federal and state court player lawsuits, all funded by the NFLPA, challenging the League's player employment rules.[9]

Absent the mandatory class mechanism, the NFL would likely have had to litigate all or most of these lawsuits to verdict, with a near certainty of varying or inconsistent adjudications. As the district court found in approving the *White* settlement, the likelihood of varying adjudications would have been increased by the inconsistent case law regarding several key issues raised in these litigations. *See White I*, 822 F. Supp. at 1408-09. For instance, with regard to the scope of the nonstatutory labor exemption, presently at least three different standards exist in three different circuits. *Compare Powell v. National Football League*, 930 F.2d 1293, 1303 (8th Cir. 1989) (exemption ends when parties' "labor relationship" ends), *cert. denied*, 498 U.S. 1040 (1991) *with Brown v. Pro Football, Inc.*, 782 F. Supp. 125, 129-34 (D.D.C. 1991) (exemption ends when parties' collective bargaining agreement expires) *and with Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 964-67 (D.N.J. 1987) (exemption ends when employer no longer "reasonably believes that the [challenged] practice

[9] *See Allen v. Chargers Football Co.*, No. CV-91-4322 (C.D. Cal.); *Chandler v. Indianapolis Colts, Inc.*, No. 54C01-9009-CP-0453 (Ind. Cir. Ct.); *Hebert v. Los Angeles Raiders*, No. S023546 (Sup. Ct. Cal.); *Jackson v. National Football League*, No. 4-92-876 (D. Minn.); *Joyner v. National Football League*, No. 92-2876 (E.D. Pa.); *McNeil v. National Football League*, No. 4-90-476 (D. Minn.); *Morris v. New York Giants, Inc.*, (arbitration); *Mullin v. Los Angeles Rams Football Co.*, No. BC-021838 (Cal. Super. Ct.); *Powell v. National Football League*, No. 91-3430MN (8th Cir.); *Solomon v. National Football League*, No. 92-1244-F (Tex. Dist. Ct.); *Tice v. Pro Football, Inc.*, No. 4-93-166 (D. Minn.).

or a close variant of it will be incorporated in the next collective bargaining agreement''). Similar conflicts exist with regard to the recognition of competitive balance as a procompetitive effect,[10] and the proper allocation of the burden of proof in a rule of reason case.[11]

On April 30, 1993, having reviewed and considered all of the briefs and affidavits submitted in support of, and in opposition to, the proposed settlement, having listened to the testimony of live witnesses, and having heard oral argument, the district court issued a 115-page order overruling all objections to the proposed settlement. Specifically, the district court's order: (i) reaffirmed that the requirements of Rule 23(b)(1) had been satisfied and that mandatory non-opt-out class certification of a settlement class thereunder had been appropriate in order to avoid the risk of inconsistent adjudications, as those risks were reflected by the requests for differing relief in several of the opt-out cases; (ii)

10 *Compare Mackey v. National Football League*, 543 F.2d 606, 621 (8th Cir. 1976) (recognizing competitive balance as a procompetitive benefit), *cert. dismissed*, 434 U.S. 801 (1977) *with Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1186 (D.C. Cir. 1978) (refusing to recognize competitive balance as a procompetitive effect).

11 *Compare North American Soccer League v. National Football League*, 670 F.2d 1249, 1261 (2d Cir.) (defendants' burden to come forward with proof that there existed no less restrictive alternative), *cert. denied*, 459 U.S. 1074 (1982) *with Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1412-13 (9th Cir.) (plaintiff's burden to show that any legitimate objectives cannot be achieved in a significantly less restrictive manner), *cert. denied*, 112 S. Ct. 617 (1991) *and with United States v. Brown University*, 1993-2 Trade Cas. (CCH) ¶ 70,358, at 70,897 (3d Cir. 1993) (plaintiff bears the burden of proving that there exists a viable less restrictive alternative).

found that the plaintiff class' claims for structural, injunctive relief predominated over its claims for damages;[12] (iii) held that due process did not require that absent class members be given a right to opt out of the mandatory class action settlement;[13] (iv) granted all objectors seeking to intervene the right of intervention for the limited purpose of allowing them to seek an appeal in the Eighth Circuit; and (v) concluded that, when weighed against the strengths of plaintiffs' case, the benefits bestowed on the class in the form of

12 In so finding, the court relied on: (i) the repeated motions for preliminary and injunctive relief filed by the plaintiffs in the various player-related litigations; (ii) the entire records of the prior player-related lawsuits over which the court presided; (iii) the repeated representations of class counsel and other player representatives that these lawsuits primarily sought either the elimination or substantial modification of various NFL rules regarding player movement and employment; (iv) the statements made by defendants and their representatives to the same effect; and (v) the terms of the settlement agreement itself, which devotes 179 of its 188 pages to redefining the rules and practices governing player employment in the NFL. *See White I*, 822 F. Supp. at 1411; *White II*, 1993 U.S. Dist. LEXIS 14570, at *39-40.

13 In this regard, the district court found that there was no constitutional due process right to opt out of a Rule 23(b)(1) class action settlement where, as in *White*: (i) the plaintiff class' claims for structural, injunctive relief "predominated" over its claims for damages; (ii) absent class members were adequately represented by the named plaintiffs and by capable and experienced class counsel; (iii) absent class members were provided with actual and extensive notice of the settlement and its terms; (iv) absent class members were provided with a full and fair opportunity to assert objections to, and to otherwise be heard with respect to, the settlement and its terms; (v) the district court, after due deliberation of all the relevant facts, the taking of testimony, and hearing the arguments in support of, and in opposition to, the settlement, approved the settlement as fair, reasonable, and adequate. See *White I*, 822 F. Supp. at 1399-1402, 1404-07, 1410-12, 1432; *White II*, 1993 U.S. Dist. LEXIS 14570, at *26-35, *36-37, *37-43, *126, *145-52.

injunctive and monetary relief constituted a fair and adequate settlement of the plaintiff class' claims. *See White I*, 822 F. Supp. at 1402-10, 1410-12, 1416-24, 1432-33; *White II*, 1993 U.S. Dist. LEXIS 14570, at *35-37, *37-43, *53-83, *128-30. Accordingly, the district court concluded that "after carefully considering all of the objections that call into question a specific provision or provisions of the Settlement Agreement, the court nonetheless concludes that the Agreement as a whole is fair, reasonable and adequate to the class." *White I*, 822 F. Supp. at 1426; *White II*, 1993 U.S. Dist. LEXIS 14570, at *96.

The district court, recognizing and expressly holding that claims for injunctive relief predominated over the damage claims, found that the only way to provide "meaningful" relief to the players in *White* was through certification of a mandatory class. Specifically, the court noted that:

> class members' claims are interrelated because players are subject to a uniform system of player rules; therefore there is a significant identity of interest between class members for purposes of analyzing their economic injuries. To provide a meaningful class remedy, any injuries must be redressed primarily through broad injunctive relief. In the absence of such relief, any award of monetary damages would merely be a stopgap measure, insufficient to prevent the reoccurrence of such injuries while likely generating an unending procession of lawsuits.

White I, 822 F. Supp. at 1411 (citation omitted). Thus, the court found that a mandatory class was necessary to avoid repetitious litigation and inconsistent adjudications, and to afford similar treatment to all class members. *See id.* at 1407-10.

After an agreement in principle had been reached to settle the *White* lawsuit, the NFLPA took steps to reconstitute itself as the exclusive collective bargaining representative of all NFL players. In March 1993, having submitted evidence of its majority support among NFL players, the NFL voluntarily recognized the NFLPA as the exclusive collective bargaining representative of all present and future NFL players.

Thereafter, the NFLPA and NFL began a process of daily intensive collective bargaining. On May 6, 1993, the NFL clubs and the NFLPA entered into a new collective bargaining agreement which included the material terms of the settlement agreement, as well as other terms and conditions of employment in the NFL.[14] That collective bargaining agreement — which will continue in effect until 2000 — was ultimately ratified by approximately 96% of the players voting.

The viability of the collective bargaining agreement, however, may depend on the continuing existence of the *White* settlement. If a mandatory class is not maintained in *White* and the NFL exercises its option to terminate, the continuing viability of the collective bargaining agreement will be in question.

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[14] On May 14, 1993, a motion was made to amend the original Stipulation and Settlement Agreement so as to reflect certain modifications necessitated as a result of collective bargaining. The district court once again proceeded with a formal settlement approval process which included a preliminary approval hearing, notice to the class inviting individual objections, and a final approval hearing. The court granted final approval to the Stipulation and Settlement Agreement, as amended, and entered a final consent judgment in *White* on August 19, 1993. *See generally White II*, 1993 U.S. Dist. LEXIS 14570.

* * *

The *White* case demonstrates the practical necessity of the mandatory class action mechanism. The *White* case involved a labor dispute which could not have been settled without the availability of a mandatory class. The settlement provided for novel and sweeping injunctive relief, which involved the complete restructuring of the NFL's employment practices, as well as a $115 million settlement payment to be distributed directly to class members. The mandatory class certification in *White* serves to avoid repetitious litigation and the near certainty of varying and inconsistent adjudications that would have followed given the widely conflicting legal standards that presently govern critical issues at the core of the players' liability claims.

The *White* mandatory class received extensive procedural safeguards including adequate representation by competent counsel with fiduciary obligations to the class, fully sufficient notice and opportunity to object, and the searching scrutiny of a district judge whose approval of the settlement is set forth in a readily reviewable 115 page opinion. Nothing more is required by due process.

II. DUE PROCESS DOES NOT REQUIRE THE RIGHT TO OPT OUT WHENEVER DAMAGE CLAIMS ARE ASSERTED IN ADDITION TO INJUNCTIVE CLAIMS

Rule 23 provides a mechanism whereby the judicial system attempts to obtain judicial economy through a single binding adjudication of both plaintiffs' and defendants' rights, while at the same time assuring due process to absent

class members and repose to defendants. Precluding individual lawsuits is considered necessary to protect the defendant from inconsistent obligations, to establish a practical and economical means for disposing of similar lawsuits, and to facilitate the spreading of litigation costs among numerous litigants with similar claims. *See, e.g., General Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-03 (1980); *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979).

The NFL respectfully submits that where the plaintiff class' claims predominantly seek injunctive relief, a district court must have discretion to certify a mandatory non-opt-out class even if that class also seeks money damages. Such discretion is not inconsistent with the due process rights of absent class members so long as they are adequately represented, are provided notice and an opportunity to be heard regarding the adequacy of class representation and their objections to the settlement, and the Court makes a finding as to overall fairness, adequacy, and reasonableness of the settlement. *See, e.g., Williams v. Burlington N., Inc.*, 832 F.2d 100, 103-04 (7th Cir. 1987), *cert. denied*, 485 U.S. 991 (1988); *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 963 (3d Cir. 1983); *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 507-08 (5th Cir. 1981); *Robertson v. National Basketball Ass'n*, 556 F.2d 682, 686 (2d Cir. 1977).

Due process is a flexible concept and requires only that an individual be treated "fairly" within the confines of

practical realities.[15] As this Court recognized in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950), a "construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified." Thus, due process allows for a "balancing" between judicial efficiency and the fair treatment of absent class members. *See Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 249 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

In *Hansberry v. Lee*, 311 U.S. 32 (1940), this Court held that class actions represent a compromise between "a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process" and the "recognized exception that . . . the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it." *Id.* at 40-41.[16] Holding that "adequacy of representation" is the touchstone of due process in class action litigation and that

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15 "Underlying those familiar concepts are familiar notions of necessity or convenience or 'practicability' weighed with or against basic principles of fairness. Such notions are flexible and adaptable to the emerging needs of an increasingly complex community. They may be sensibly and justly applied in ways that will make it entirely fair to render judgments 'binding' upon absent parties in actions that were formerly labeled 'spurious,' and therefore, by definition, non-binding." Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23,* 43 F.R.D. 39, 46 (1967).

16 *See also Martin v. Wilks*, 490 U.S. 755, 761-62 & n.2 (1989) (noting class action litigation under Rule 23 as a "recognized" exception to the general rule that a person is bound only by lawsuits in which he is a party).

absent class members will be bound by all class action judgments in which they are adequately represented, the Court stated:

> so far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented, though absent, which would satisfy the requirements of due process and full faith and credit.

Id. at 43.

Several years later, in *Mullane*, this Court confirmed that notice and an opportunity to be heard satisfy due process requirements. In a case that involved the due process rights of absent nonresident trust beneficiaries, the Court stated that:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. "The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals."

339 U.S. at 314-15 (citations omitted).[17]

The Ninth Circuit's decision below is inconsistent with these principles and is not compelled by *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).[18] In cases properly

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17 Rule 23 was designed by the Advisory Committee, in accordance with this Court's decisions in *Hansberry* and *Mullane*, "to fulfill requirements of due process to which the class action procedure is of course subject." Amendments to Rules of Civil Procedure, Advisory Committee's Note to Rule 23, 39 F.R.D. 69, 107 (1966).

18 In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), upon which the Ninth Circuit incorrectly relied, this Court held that a state court had jurisdiction over nonresident class members in a case "wholly or predominantly for money judgments" because the state class action statute required that absent class members be provided with notice, an opportunity to be heard, and the right to opt out. *Id.* at 811 n.3. This Court specifically "intimate[d] no view" whether opt-out rights were constitutionally required in other types of class actions. *Id. See also In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703, 714 (E.D. Mich. 1985) ("the Supreme Court [in *Shutts*] did not intend to bar every mandatory class action that did not afford the right of exclusion"); *Bell v. American Title Ins. Co.*, 226 Cal. App. 3d 1589, 1610, 277 Cal. Rptr. 583, 595 (Ct. App.) ("[c]ourts which have addressed the effect of *Shutts* on mandatory classes under rule 23(b)(1) and (b)(2) have interpreted the case as creating no due process right to opt out of such classes"), *review denied*, 1991 Cal. LEXIS 2002 (1991); 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 1.19, at 1-48 (3d ed. 1992) ("*Shutts* was silent about the validity of classes certified under Federal Rule 23(b)(1) and (2) or their equivalents which do not provide . . . opt-out rights. It is highly unlikely that the Supreme Court would have invalidated such rules without expressly doing so"); 7B Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1789, at 256 (2d ed. 1986) ("it seems appropriate to read Shutts restrictively as setting forth its [opt-out] requirements only for Rule 23(b)(3) damage suits, and not as suggesting that similar restraints may be placed on other class actions").

certified under Rules 23(b)(1) and (b)(2),[19] adequacy of representation, notice, and opportunity to be heard are sufficient procedural safeguards to protect the due process rights of absent class members. "Any resultant unfairness to the members of the class [is] outweighed by the purposes behind class actions," see *Wetzel*, 508 F.2d at 249 — namely, eliminating the possibility of repetitious litigation and the risk of inconsistent adjudications, promoting settlement, and providing benefits to the entire class.

In the class action context, members of a mandatory class do have their "day in court." Upon receiving notice, the absent class member has an opportunity to intervene where appropriate, or to appear to state his objections in the class action settlement proceeding. There is nothing inherent in the opt-out right that provides him with any greater opportunity to assert his rights. On the other hand, where injunctive

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19 Class actions involving claims for money damages in addition to injunctive relief are routinely certified pursuant to Rules 23(b)(1) and (b)(2). *See, e.g., Robertson v. National Basketball Ass'n*, 556 F.2d 682, 685 (2d Cir. 1977); *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 962-66 (3d Cir. 1983); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 801-02 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 506-08 (5th Cir. 1981); *King v. South Cent. Bell Tel. & Tel. Co.*, 790 F.2d 524, 528-31 (6th Cir. 1986); *Williams v. Burlington N., Inc.*, 832 F.2d 100, 103-04 (7th Cir. 1987), *cert. denied*, 485 U.S. 991 (1988); *Reynolds v. National Football League*, 584 F.2d 280, 283-85 (8th Cir. 1978); *Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 780 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986); *Larionoff v. United States*, 533 F.2d 1167, 1181-82 n.36 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977).

relief predominates, an opt-out right would lead to repetitious litigation and inconsistent adjudications, and would deter the settlement of large, complex disputes.[20]

III. THE NINTH CIRCUIT'S DECISION SEVERELY UNDERMINES THE PRACTICAL UTILITY OF THE RULE 23 MECHANISM

The Ninth Circuit's sweeping decision will eviscerate the utility of Rule 23(b)(1) and (b)(2) class actions and strike a severe blow to the continuing effectiveness and efficiency of our federal court system.

A. The Mandatory Class Action Mechanism Is Routinely Utilized In A Wide Variety Of Litigation Contexts

The mandatory class action mechanism provided for under Federal Rules 23(b)(1) and (b)(2) is routinely utilized in a wide variety of litigation contexts, and has often proven vital to the ability of the parties to reach an early and

20 In the *White* settlement, the district court employed procedural safeguards that were the functional equivalent of those provided by the opt-out provisions of Rule 23(b)(3). *See Williams*, 832 F.2d at 104; *Kincade*, 638 F.2d at 506-08. First, the court made extensive findings as to why the plaintiff class' claims were predominantly injunctive in nature. *See White I*, 822 F. Supp. at 1411; *White II*, 1993 U.S. Dist. LEXIS 14570, at *39-40. Second, the court found that the class was adequately represented. *See White I*, 822 F. Supp. at 1404-07; *White II*, 1993 U.S. Dist. LEXIS 14570, at *35-37. Third, the court afforded the absent class members with thorough and adequate notice, and an opportunity to be heard regarding their objections to the settlement – including allowing testimony and cross-examination. *See White I*, 822 F. Supp. at 1399-1402; *White II*, 1993 U.S. Dist. LEXIS 14570, at *26-35. Finally, the district court held a hearing at which it heard argument regarding the fairness, reasonableness, and adequacy of the settlement. *See id.*

amicable resolution of class litigation. The areas in which the mandatory class mechanism is most frequently used include: (i) cases involving claims for government benefits;[21] (ii) cases involving employment discrimination and other civil rights claims;[22] and (iii) cases involving labor disputes.[23]

Particularly in the context of labor disputes, it is significant that, within the past two decades, mandatory class-wide settlements have been utilized to resolve a number of cases in which professional athletes have challenged employment restrictions in their respective professional sports leagues. *See Alexander v. National Football League*, 1977-2 Trade Cas. (CCH) ¶ 61,730 (D. Minn. 1977), *aff'd sub nom. Reynolds v. National Football League*, 584 F.2d 280 (8th Cir. 1978); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977); *Bridgeman v. National Basketball Ass'n*, Civ. No. 87-4001, slip op. (D.N.J. Apr. 18, 1988). In none of these cases was the lack of an opt-out right deemed fatal to the settlement, and indeed, in *Robertson*, the proposed settlement was approved by the Second Circuit

21 *See, e.g., Califano v. Yamasaki*, 442 U.S. 682 (1979) (social security benefits); *Hohe v. Casey*, 128 F.R.D. 68 (M.D. Pa. 1989) (state government's "fair share arrangement" with union).

22 *See, e.g., King v. South Cent. Bell Tel. & Tel. Co.*, 790 F.2d 524 (6th Cir. 1986) (employment discrimination); *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501 (5th Cir. 1981) (employment discrimination).

23 *See, e.g., Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956 (3d Cir. 1983) (employee defined-benefits plan); *Laskey v. International Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 638 F.2d 954 (6th Cir. 1981) (health insurance benefits); *Mungin v. Florida E. Coast Ry. Co.*, 318 F. Supp. 720 (M.D. Fla. 1970) (Railway Labor Act violations and breach of collective bargaining agreements), *aff'd mem.*, 441 F.2d 728 (5th Cir.), *cert. denied*, 404 U.S. 897 (1971).

despite direct constitutional challenges to the maintenance of a mandatory class. *See Robertson*, 556 F.2d at 686 ("[w]hen appropriate notice and opportunity have been provided, preclusion of the opt-out right in a (b)(1) settlement does not violate due process").

Indeed, in labor disputes, a mandatory class consisting of employees, as in *White*, is consistent with the principle that properly constituted collective bargaining representatives can negotiate back-to-work or reinstatement agreements after a strike or lock-out, and compromise claims for back pay of individual members, who are bound by the union's negotiations. *See, e.g., Mahon v. NLRB*, 808 F.2d 1342, 1345 (9th Cir. 1987). There is no analytical difference between the right of a union to settle employee back pay claims and the ability of class counsel, found by the court to be adequate class representatives, to settle the employment-related claims of mandatory class members, subject to court approval of the fairness of the settlement.

B. Mandatory Non-Opt-Out Class Actions Promote Judicial Efficiency

Policy considerations that have important practical implications, such as "finality of judgment" and the avoidance of repetitious litigation, as well as the avoidance of procedural complications, have routinely been taken into account by courts choosing to certify classes pursuant to Rule 23(b)(1) or (b)(2) instead of Rule 23(b)(3). *See, e.g., Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 244 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); *Specialty Cabinets & Fixtures, Inc. v. American Equitable Life Ins. Co.*, 140 F.R.D. 474, 477 (S.D. Ga. 1991). Indeed, it has become a general rule of practice that, where a class action is

properly certifiable under either the mandatory provisions of Rules 23(b)(1) and/or (b)(2) or the opt-out provisions of Rule 23(b)(3), the class should be certified exclusively under the mandatory provisions. *See id.*[24]

Any bifurcation of class certification should be a decision left to the discretion of the trial court. *See, e.g., Williams v. Burlington N., Inc.*, 832 F.2d 100, 103 (7th Cir. 1987) (in context of mandatory class action settlement, the district court's refusal to bifurcate the class certification between equitable and monetary phases of relief was not an abuse of

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24 *See also* 3B James W. Moore & John E. Kennedy, *Moore's Federal Practice* ¶ 23.31[3], at 23-236 (1993) ("[i]f an action can be maintained under (b)(1) and/or (b)(2), and also under (b)(3), the court should order that the suit be maintained as a class action under (b)(1) and/or (b)(2) . . . so that the judgment will have res judicata effect as to all the class . . . thereby furthering [the] policy underlying the (b)(1) and (b)(2) class suits"); 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 4.20, at 4-71 (3d ed. 1992) ("[i]f federal district courts had discretion to certify the Rule 23(b)(1) or (b)(2) type of situations under the more general provisions of Rule 23(b)(3), the intention of the drafters of Rule 23 to promote uniformity of decision in certain types of cases would be nullified. It follows that class actions that qualify for class certification under subdivision (b)(1) or (b)(2) should not normally be certified under subdivision (b)(3)"); 7A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1772, at 425 (2d ed. 1986) ("[s]ince the class members in a Rule 23(b)(3) action are given the option not to be included in the judgment, it has been held that Rule 23(b)(1) should control when both provisions apply").

discretion), *cert. denied*, 485 U.S. 991 (1988).[25] Such a bifurcation procedure should not be constitutionally mandated where, as in *White*, injunctive and monetary relief are inextricably intertwined, and where sufficient alternative procedural safeguards are employed by the court so as adequately to protect the individual rights of absent class members.

C. The Mandatory Class Action Mechanism Often Facilitates The Resolution Of Class Claims By Settlement

Public policy strongly favors the settlement of class action litigation. *See, e.g., Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). The utility of the mandatory class action in facilitating settlement has been widely recognized and has often been identified as an important consideration underlying a court's decision to certify a mandatory class. As noted by the Fifth Circuit in *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501 (5th Cir. 1981):

> There is also an important policy consideration dictating that objectors to the settlement of a Rule 23(b)(2) class action need not be provided an opportunity to opt out of the settlement. "Particularly in class action suits, there is an overriding

[25] *See also Bell v. American Title Ins. Co.*, 226 Cal. App. 3d 1589, 1609, 277 Cal. Rptr. 583, 594 (Ct. App.) ("where, as here, the class members are adequately represented by counsel, are given notice and an opportunity to express their objections to the settlement, and the court holds a final hearing to determine the fairness and adequacy of the settlement, the trial court does not abuse its discretion by failing to treat the damages aspect of the case under Rule 23(b)(3)"), *review denied*, 1991 Cal. LEXIS 2002 (1991).

> public interest in favor of the settlement;" allowing objectors to opt out would discourage settlements because class action defendants would not be inclined to settle where the result would likely be a settlement applicable only to class members with questionable claims, with those having stronger claims opting out to pursue their individual claims separately.

Id. at 507 (citations omitted).[26]

Thus, the Ninth Circuit's decision below would serve to discourage or eliminate class action settlements, and clearly runs against the strong public policy favoring such settlements.

[26] *See also King v. South Cent. Bell Tel. & Tel. Co.*, 790 F.2d 524, 528 (6th Cir. 1986); *Kemp v. Birmingham News Co.*, 608 F.2d 1049, 1053 (5th Cir. 1979); *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 1986-1 Trade Cas. (CCH) ¶ 67,149, at 62,929 (E.D. Pa. 1986), *aff'd*, 815 F.2d 695 (3d Cir. 1987), *cert. denied*, 485 U.S. 909 (1988); *Mungin v. Florida E. Coast Ry. Co.*, 318 F. Supp. 720, 736-37 (M.D. Fla. 1970), *aff'd mem.*, 441 F.2d 728 (5th Cir.), *cert. denied*, 404 U.S. 897 (1971); 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 5.40, at 5-37 (3d ed. 1992).

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TICOR TITLE INSURANCE COMPANY, *et al.*,

Petitioners,

—v.—

WALTER THOMAS BROWN and JEFFREY L. DZIEWIT,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE AMERICAN INSURANCE ASSOCIATION, CONTINENTAL CASUALTY COMPANY AND PACIFIC INDEMNITY COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974).... 17n

Hanna v. *Plumer*, 380 U.S. 460 (1965)..... 19

Hansberry v. *Lee*, 311 U.S. 32 (1940) .....*passim*

Hartford Life Ins. Co. v. *Barber*, 245 U.S. 146 (1917) . 16

Hartford Life Ins. Co. v. *Ibs*, 237 U.S. 662 (1915) 16

Holmes v. *Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983) 21

In re "Agent Orange" Product Liability Litigation, 996 F.2d 1425 (2d Cir. 1993).....4n, 9

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In re A.H. Robins Company, Inc., 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989) ..... *passim*

In re Baldwin-United Corp., 105 F.R.D. 475 (S.D.N.Y. 1984) 8n

In re "Bendectin" Products Liability Litigation, 102 F.R.D. 239 (S.D. Ohio), *mandamus granted*, 749 F.2d 300 (6th Cir. 1984) 6

In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285 (2d Cir. 1992), *cert. dism'd*, 113 S. Ct. 1070 (1993) 8n

In re Granada Partnership Securities Litigation, 803 F. Supp. 1236 (S.D. Tex. 1992) 8n

In re Jackson/Lockdown MCO Cases, 107 F.R.D. 703 (E.D. Mich. 1985) 26n

In re Joint Eastern and Southern District Asbestos Litigation ("Eagle-Picher"), 134 F.R.D. 32 (E. & S.D.N.Y. 1990) 8n

In re Joint Eastern and Southern District Asbestos Litigation ("Johns-Manville"), 129 B.R. 710 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir.1993) ..... *passim*

In re Joint Eastern and Southern District Asbestos Litigation ("Johns-Manville"), 1991 U.S. Dist. LEXIS 7527 (E. & S.D.N.Y. May 16, 1991) 6

In re Real Estate Title and Settlement Servs. Antitrust Litig., 815 F.2d 695 (3d Cir. 1987) (mem. op.), *cert. denied*, 485 U.S. 909 (1988) 26n, 27n

In re Real Estate Title and Settlement Servs. Antitrust Litig., 869 F.2d 760 (3d Cir.), *cert. denied*, 49 U.S. 821 (1989) 26n

PAGE

In re Silicone Gel Breast Implant Products Liability Litigation ("Mentor Corp."), MDL-926 (N.D. Ala. Ala. Sept. 10. 1993) 7n

In re United Energy Corp. Securities Litigation, [1989 Tr. Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,376 C.D. (C.D. Cal. 1989) 8n

International Shoe Co. v. *Washington*, 326 U.S. 310 (1945) 24

Keeton v. *Hustler Magazine, Inc.*, 465 U.S. 770 (1984) 24

Kincade v. *General Tire & Rubber Co.*, 635 F.2d 501 (5th Cir. 1981) 10, 21, 26n

Martin v. *Wilks*, 490 U.S. 755 (1989) 18, 20

Mathews v. *Eldridge*, 424 U.S. 319 (1976) ..... *passim*

Milliken v. *Meyer*, 311 U.S. 457 (1940) 24

Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) 21, 24, 24n, 28

Nottingham Partners v. *Dana*, 564 A.2d 1089 (Del. 1989) 26n

Officers for Justice v. *Civil Service Commission*, 688 F.2d 615 (9th Cir. 1983) 8n

Pacific Mutual Life Insurance Co. v. *Haslip*, 499 U.S. 1 (1991) 19

Phillips Petroleum Co. v. *Shutts*, 472 U.S. 797 (1985) ... *passim*

Robertson v. *National Basketball Ass'n*, 556 F.2d 682 (2d Cir. 1977) 26n

Schad v. *Arizona*, 501 U.S. ____, 111 S. Ct. 2491 (1991) 19

PAGE

Shaffer v. *Heitner*, 433 U.S. 186 (1977) 24

Smith v. *Swormstedt*, 57 U.S. (16 How.) 288 (1854) ... 15

Sovereign Camp of the Woodmen of the World v. *Bolin*, 305 U.S. 66 (1938) 16

Supreme Tribe of Ben Hur v. *Cauble*, 255 U.S. 356 (1921) 16

Waldron v. *Raymark Industries, Inc.*, 124 F.R.D. 235 (N.D. Ga. 1989) 27

Walsh v. *Great Atlantic & Pacific Tea Company, Inc.*, 726 F.2d 956 (3d Cir. 1983) 21

Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 23

Wetzel v. *Liberty Mut. Ins. Co.*, 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975) 26n

World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980) 25

STATUTES AND RULES

Federal Equity Rule 38 16

Federal Rule of Civil Procedure 23 ..... *passim*

28 U.S.C. § 1404 ..... 25n

OTHER AUTHORITIES

Advisory Committee's Note to Rule 23, 39 F.R.D. 98 (1966) ..... *passim*

PAGE

Baughman, Steve, Note, *Class Actions in the Asbestos Context: Balancing the Due Process Considerations Implicated by the Right to Opt Out*, 70 Tex. L. Rev. 211 (1991) 7

Chafee, Zechariah, *Some Problems of Equity* (1950) ... 15

Frankel, Marvin E., *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39 (1967) ... 17

Friendly, Henry J., *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975) 23

Hensler, Deborah R., *et al.*, *Asbestos in the Courts, The Challenge of Mass Toxic Torts* 28 (Rand Corporation Institute for Civil Justice 1985) 4

Kakalik, James S., *et al.*, *Variation in Asbestos Litigation Compensation and Expenses* 91 (Rand Corporation Institute for Civil Justice 1984) 5

Kaplan, Benjamin, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356 (1967) ... 14

Kerr, Peter, *Two Insurers Settle on Asbestos*, N.Y. Times, Aug. 31, 1993 ..... 10n

Laycock, Douglas, *Modern American Remedies* (1985) .. 15

Miller, Arthur R. & David Crump, *Jurisdiction & Choice of Law in Multi-state Class Actions after Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1 (1986) 15, 23, 28

Miller, Arthur R. & Price Ainsworth, *Resolving the Asbestos Personal-Injury Litigation Crisis*, 10 Rev. Litig. 419 (1991) 4

PAGE

Moore, James W. & John E. Kennedy, 3B *Moore's Federal Practice* (1992) 17

Newberg, Herbert & Alba Conte, 1 *Newberg on Class Actions* (1992) ..... *passim*

Newberg, Herbert & Alba Conte, 3 *Newberg on Class Actions* (1992) 21

Panzer, Irving & Thomas Patton, *Utilizing the Class Action Device in Mass Tort Litigation*, 21 Tort & Ins. L.J. 560 (1986) 7

Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (1991) 3, 4, 5, 6

Robinson, Glen O. & Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 Va. L. Rev. 1481 (1992) ... 9

Sand, Robert H., *How Much is Enough? Observations in Light of the Agent Orange Settlement*, 9 Harv. Envtl. L. Rev. 283 (1985) 5

Schultz, Steven L., *Mass Torts: In re Joint Eastern and Southern District Asbestos Litigation; Bankrupt and Backlogged—A Proposal for the Use of Federal Common Law in Mass Tort Class Actions*, 58 Brooklyn L. Rev. 553 (1992) 28

Steinmetz, Greg & Marilyn Chase, *Fibreboard Sets Asbestos Accord With Insurers*, Wall Street Journal, Aug. 31, 1993 ..... 10n

Wright, Charles A., Arthur R. Miller & Mary Ann Kane, 7A *Federal Practice and Procedure* (1986) 15

Wright, Charles A., Arthur R. Miller & Mary Ann Kane, 7B *Federal Practice and Procedure* (1986) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1988

TICOR TITLE INSURANCE COMPANY, *et al.*,
Petitioners,

—v.—

WALTER THOMAS BROWN and JEFFREY L. DZIEWIT,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE AMERICAN INSURANCE ASSOCIATION, CONTINENTAL CASUALTY COMPANY AND PACIFIC INDEMNITY COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

CONSENT OF PARTIES

Petitioners and respondents have consented to the filing of this brief, and their letters of consent are being filed separately herewith.

INTEREST OF *AMICI*: THE MASS-TORT LITIGATION CRISIS AND RULE 23(b)(1)(B) SETTLEMENTS

The American Insurance Association ("AIA") is a national trade organization representing some 254 companies writing property and casualty insurance throughout the United States.*

* These companies together write insurance totalling more than $60 billion in premiums annually. A substantial portion of AIA member companies' business is commercial liability insurance.

(footnote continued)

A number of these insurance companies face significant potential liability arising out of so-called "mass torts." Additional *amici* Continental Casualty Company and Pacific Indemnity Company are two insurers that have recently agreed in principle to pay in excess of $1.5 billion to create a settlement trust, in a Rule 23(b)(1)(B) class action, for the purpose of compensating more than 150,000 future asbestos personal-injury claimants. *Ahern* v. *Fibreboard Corp.*, Civil Action No. 6:93cv526 (E.D. Tex.).

Amici believe that the question presented by the instant case—whether the Due Process Clause *requires* that class members be afforded opt-out rights in *every* damages case brought under Rule 23—raises important social and public policy issues that are of utmost concern to both tort claimants and business, and to the judicial system as a whole.

Mass torts involve widespread personal injuries caused, for example, by asbestos, lead paint, birth-control devices, herbicides, pharmaceuticals and silicone breast implants. In recent years, the federal courts have begun to resolve mass-tort litigation through the use of "limited fund" class settlements pursuant to Rule 23(b)(1)(B), Fed. R. Civ. P.—a procedure that seeks to assure the equitable distribution to claimants of limited resources by bringing all claimants into a single class-action proceeding. *Amici* believe that the Ninth Circuit's decision, which suggests that each class member has an unqualified right to litigate his or her damages claims in a separate proceeding, unjustifiably casts doubt on the continued validity of such no-opt-out "limited fund" settlements.

As is set forth in detail below, preservation of the no-opt-out limited-fund class as a mass-tort settlement tool is of critical importance to mass-tort claimants, to mass-tort defendants and

The purposes of the AIA are to promote the economic, legislative and public standing of its members and of the insurance industry; to provide a forum for discussion of problems that are of common concern to its members; to keep members informed of regulatory and legislative developments; and to serve the public interest through appropriate activities, including the promotion of safety and security of persons and property.

their insurers, and to the courts themselves. Indeed, no other judicial mechanism developed to date guarantees as effectively the equitable treatment of injured claimants, while permitting defendants and insurers meaningfully to gauge and manage their mass-tort exposure. Rule 23(b)(1)(B) not only comports with due process but provides the best means of protecting the rights of future claimants by reducing transaction costs, assuring the preservation of resources for compensation, and alleviating the backlog in the courts. Accordingly, *amici* urge this Court to remove the doubt cast by the Ninth Circuit's decision upon the continued validity of the no-opt-out class action provisions of Rule 23.

I. The Mass-Tort Problem

Litigation arising out of mass torts now constitutes nothing less than a crisis—a crisis for claimants seeking compensation, for defendants facing such lawsuits, for their insurers, and for the judicial system itself.

The enormous volume of mass-tort cases is alone sufficient to hamper—in many instances, to foreclose—their effective management and fair adjudication. It has been estimated, for example, that there are approximately 100,000 asbestos-related personal-injury cases pending in the state and federal courts. *See In re Joint Eastern and Southern District Asbestos Litigation ("Johns-Manville")*, 129 B.R. 710, 746 (E. & S.D.N.Y. 1991), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993). And for every asbestos case terminated in the federal system almost two new asbestos cases are filed. Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (1991) ("Ad Hoc Committee Report") at 8.*

* Similar volumes of claims arise in other mass-tort contexts. In the Dalkon Shield intrauterine-device litigation, for example, the Fourth Circuit noted that there existed over 300,000 claims—raising the spectre of a like number of lawsuits absent class certification. *In re A.H.*

Exacerbating the effect of the sheer volume of mass-tort cases is their factual and legal complexity. " '[A] typical asbestos case involves a claim against an average of 20 defendants who file cross-claims against each other, a lengthy discovery process, including record searches and specialized medical exams . . . .' Thirty or more legal issues can be presented in the course of a single asbestos case." Ad Hoc Committee Report, *supra*, at 11 (quoting Deborah R. Hensler, *et al.*, *Asbestos in the Courts, The Challenge of Mass Toxic Torts* 28 (Rand Corporation Institute for Civil Justice 1985)).*

The volume and complexity of mass-tort litigation spell delay, often tragic delay, for the plaintiffs. The average disposition time of an asbestos case terminated in federal court in 1989 was 995 days. Arthur R. Miller & Price Ainsworth, *Resolving the Asbestos Personal-Injury Litigation Crisis*, 10 Rev. Litig. 419 (1991). During the pendency of one asbestos litigation, 448 of the original plaintiffs died. *Cimino*, *supra*, 751 F. Supp. at 651. "Under these circumstances, the principle of 'justice delayed is justice denied' has added meaning." Ad Hoc Committee Report, *supra*, at 12.

Further, legal fees and other "transaction costs" are unacceptably high in relation to the compensation ultimately made available to claimants. Looking once again to the asbestos con-

Robins Company, Inc., 880 F.2d 709, 741 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989). In the Agent Orange class action, the class consisted of "several hundred thousand" soldiers who had been exposed to the herbicide. *In re "Agent Orange" Product Liability Litigation*, 996 F.2d 1425, 1428 (2d Cir. 1993).

* An example of this complexity is provided by *Cimino* v. *Raymark Industries, Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990), where the trial consumed 133 days of trial time and required the entry of 373 signed orders by the Court. Prior to trial 1,885 sets of interrogatories had been answered and 2,354 depositions taken, with an additional 800 depositions being taken during trial. Independent medical examinations were conducted of 1,400 plaintiffs. During the trial 271 expert witnesses and 292 fact witnesses testified, and 6,176 exhibits were received in evidence consisting of 577,000 pages of documents. *Id.* at 653.

text, one finds that of the billions of dollars spent to date on asbestos-related litigation only 39% has gone to the injured plaintiffs. James S. Kakalik, *et al.*, *Variation in Asbestos Litigation Compensation and Expenses* 91 (Rand Corporation Institute for Civil Justice 1984).* *See also, e.g.*, Robert H. Sand, *How Much is Enough? Observations in Light of the Agent Orange Settlement*, 9 Harv. Envtl. L. Rev. 283, 297-98 (1985).

As the costs of mass-tort litigation have exploded, the pool of resources available to compensate injured claimants has begun to evaporate, leading to a "race to the courthouse" to claim available funds. For example, asbestos litigation has to date brought about the bankruptcy or dissolution of no fewer than sixteen American companies.** Moreover, because many of the injuries in mass-tort cases result from insidious diseases that may take decades to manifest themselves, there is often a real threat that so-called "future" claimants—*i.e.*, victims whose injuries have not yet manifested themselves—will be left without any source of compensation. *See, e.g.*, Ad Hoc Committee Report, *supra*, at 34-35. This situation led the Ad Hoc Committee on Asbestos Litigation to observe (in words applicable today to a variety of mass torts):

> [W]ith the present rate of dissipation of the funds of defendant producers due to transaction costs, large verdicts, and multiple punitive damage awards, all resources

* Indeed, a more recent estimate placed the total received by asbestos plaintiffs at only 30 cents for every dollar expended in litigation. *See Johns-Manville*, *supra*, 129 B.R. at 749.

** These companies include: UNR Industries, Inc.; Johns-Manville Corporation; Amatex Corporation; Forty-Eight Insulations, Inc.; Pacor, Inc.; Standard Insulations, Inc.; Nicolet, Inc.; Raymark Industries, Inc.; Raytech Corporation; Hillsborough Holding Corporation; The Celotex Corporation; National Gypsum Company; Eagle-Picher Industries, Inc.; H.K. Porter Company, Inc.; Continental Products; and North American Asbestos Corporation. And Keene Corporation has recently instituted judicial proceedings seeking court-formulated procedures to stave off bankruptcy. *See Keene Corp.* v. *Fiorelli*, CV-93-2129 (E. & S.D.N.Y.).

> for payment of these claims will be exhausted in a few years. That will leave many thousands of severely damaged Americans with no recourse at all. Aggrieved citizens will further burden public finances for welfare and health care.

Ad Hoc Committee Report, *supra*, at 27.*

Finally, the burden that mass-tort litigation places on the judicial system is so substantial as to have an impact on *all* litigants. *See, e.g., Johns-Manville, supra*, 129 B.R. at 750 ("The large number of asbestos lawsuits pending throughout the country threatens to overwhelm the courts and deprive all litigants, in asbestos as well as other civil cases, of meaningful resolution of their claims."); *In re "Bendectin" Products Liability Litigation*, 102 F.R.D. 239, 240 n.3 (S.D. Ohio) (existing Bendectin docket alone would require 105 "Judge years" to try), *mandamus granted on other grounds*, 749 F.2d 300 (6th Cir. 1984). In the Eastern District of Texas, for example, an astounding 34.1% of civil case filings in 1990 were related to asbestos alone. Ad Hoc Committee Report, *supra*, at 8. Mass-tort cases, in sum, have the potential to swamp the courts, to the detriment of all citizens. *See generally, e.g., In re A.H. Robins, supra*, 880 F.2d at 726; *In re Joint Eastern and Southern District Asbestos Litigation ("Johns-Manville")*, 1991 U.S. Dist. LEXIS 7527, at 64-65 (E. & S.D.N.Y. May 16, 1991).

Noting this phenomenon, one recent commentator has written as follows:

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* Further, many still-solvent American companies have seen precious resources—financial and human—diverted from productive use to the defense of mass-tort litigation. For many of these companies, and their insurers, moreover, long-term planning has been rendered difficult or impossible: product-liability claims can continue to arise for many years—sometimes, for decades—after the manufacture of a product has ceased. And financing sources often become unavailable in the face of potentially enormous tort liability stretching out into the foreseeable future. In short, mass-tort litigation often cripples, where it does not kill, the corporate defendants involved.

> The asbestos cases provide the most dramatic and widespread example of a broader litigation crisis facing the nation's court system—dealing with mass tort cases. Mass accidents and mass exposures to toxic substances have engendered an avalanche of lawsuits, which threaten to bury state and federal court systems with thousands of repetitive claims. Besides asbestos, other notable examples of mass tort cases include those involving Agent Orange, the Dalkon Shield IUD, and Diethylstilbestrol (DES). . . . As American society becomes more complex and these types of actions grow more common, it is increasingly critical that courts apply some type of procedural device to handle mass tort cases efficiently.

Steve Baughman, Note, *Class Actions in the Asbestos Context: Balancing the Due Process Considerations Implicated by the Right to Opt Out*, 70 Tex. L. Rev. 211, 212 (1991) (footnotes omitted). *See also, e.g.*, Irving Panzer & Thomas Patton, *Utilizing the Class Action Device in Mass Tort Litigation*, 21 Tort & Ins. L.J. 560, 561 (1986) ("The public is crying out for better solutions to mass tort litigation than separate, redundant trials in thousands of related cases.").

II. The (b)(1)(B) "Limited Fund" Settlement Mechanism

In recent years, federal courts grappling with the mass-tort crisis have increasingly turned toward one potential solution to provide a more equitable means to resolve these massive litigations: no-opt-out "limited fund" settlements under Rule 23(b)(1)(B).* Such settlements allow courts (1) equitably to

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* *See, e.g., Johns-Manville, supra*, 982 F.2d at 738-39 (permitting use of Rule 23(b)(1)(B) no-opt-out class action for distribution of asbestos personal-injury settlement trust); *In re A.H. Robins, supra*, 880 F.2d at 741 (approving certification of limited-fund settlement class under Rule 23(b)(1)(B) in dispute between insurer and insured arising out of disputed liability for injuries caused by intrauterine device); *In re Silicone Gel Breast Implant Products Liability Litigation ("Mentor Corp.")*,

distribute among competing claimants the limited funds available from a given defendant, thereby eliminating the inequities that result from awarding such funds on a race-to-judgment basis; and (2) to reduce the legal fees and other transaction costs associated with repetitive individual litigations, thus increasing the funds available to compensate injured claimants.*

The no-opt-out feature of Rule 23(b)(1)(B) classes is essential to achieving each of these important goals. Indeed, to allow

MDL-926 (N.D. Ala. Sept. 10. 1993) (certifying Rule 23(b)(1)(B) limited-fund, no-opt-out settlement class of breast implant personal-injury claimants); *Ahern* v. *Fibreboard Corp.*, *supra* (E.D. Tex. Sept. 9, 1993) (provisionally certifying Rule 23(b)(1)(B) limited-fund, no-opt-out settlement class of future asbestos personal-injury claimants); *In re Joint Eastern and Southern District Asbestos Litigation ("Eagle-Picher")*, 134 F.R.D. 32, 35 (E. & S.D.N.Y. 1990) (conditionally certifying Rule 23(b)(1)(B) limited-fund, no-opt-out settlement class of future asbestos personal-injury claimants). *See also In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291-92 (2d Cir. 1992) (affirming certification of Rule 23(b)(1)(B) limited-fund, no-opt-out settlement class of securities-fraud claimants), *cert. dism'd*, 113 S. Ct. 1070 (1993); *In re Granada Partnership Securities Litigation*, 803 F. Supp. 1236, 1244 (S.D. Tex. 1992) (certifying Rule 23(b)(1)(B) limited-fund, no-opt-out settlement class of claimants with claims of securities fraud, RICO violations and violations of state law); *In re United Energy Corp. Securities Litigation*, [1989 Tr. Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,376 (C.D. Cal. 1989) (certifying Rule 23(b)(1)(B) limited-fund, no-opt-out settlement class of securities-fraud claimants); *Bush* v. *Rewald*, [1986-1987 Tr. Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,999 (D.Haw. 1986) (same).

* The initial question of whether or not to *certify* a class action, and in particular the difficulties inherent in certifying mass-tort class actions for litigation, as opposed to settlement, purposes, is beyond the scope of this brief. It should be noted, however, that the courts have sensibly applied a more relaxed standard to the certification of class actions in the settlement context. *See, e.g.*, *Bowling* v. *Pfizer, Inc.*, 143 F.R.D. 141, 158 (S.D. Ohio 1992); *In re Baldwin-United Corp.*, 105 F.R.D. 475, 480 (S.D.N.Y. 1984); *see also Officers for Justice* v. *Civil Service Commission*, 688 F.2d 615, 633 (9th Cir. 1983); *cf. In re A.H. Robins, supra*, 880 F.2d at 740 ("If not a ground for certification *per se*, certainly settlement should be a factor, and an important factor, to be considered when determining certification.").

opt-outs in a Rule 23(b)(1)(B) limited-fund class action would completely defeat the purposes of the class-action mechanism to equitably and efficiently resolve large numbers of claims on a unitary basis. As explained by Professors Robinson and Abraham:

> Permitting individuals to pursue separate claims [against a limited fund] runs the risk of an inequitable distribution of compensation if early claimants draw down the fund disproportionately, or perhaps exhaust it altogether. If . . . due process does not entitle one plaintiff's claim to preempt another's, there can be no due process right to opt out in this situation.

Glen O. Robinson & Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 Va. L. Rev. 1481, 1506 (1992). This is particularly true in mass-tort situations, which often involve unknown potential future claimants whose injuries—absent a mandatory class-action device—may not become manifest until after any fund available to compensate them has been exhausted. *See In re "Agent Orange," supra*, 996 F.2d at 1435 (future claimants' rights protected not by opt-out right, but by "ensuring that they receive vigorous and faithful vicarious representation"). "The societal cost of permitting opt-outs for the purpose of individual adjudications in these inherent class action situations could be enormous . . . ." 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 1.22, at 1-51 (1992).

Further, the no-opt-out feature is often of cardinal importance to defendant manufacturers who hope to quantify their liability and thus assure their business survival, and to their insurers, who may be willing to resolve coverage disputes in exchange for the certainty provided by a no-opt-out settlement. As the Fifth Circuit has noted:

> [A]llowing objectors to opt out would discourage settlements because class action defendants would not be inclined to settle where the result would likely be a settlement applicable only to class members with

questionable claims, with those having stronger claims opting out to pursue their individual claims separately.

Kincade v. *General Tire & Rubber Co.*, 635 F.2d 501, 507 (5th Cir. 1981).

The recent *Fibreboard* "futures" settlement* well illustrates the utility of the no-opt-out (b)(1)(B) approach. There, a financially hard-pressed former asbestos manufacturer and its two insurers have reached agreement in principle with class representatives to create and fund a $1.5 billion-plus settlement trust to redress *all* future asbestos-related personal-injury claims against the manufacturer. A *sine qua non* of the settlement was that it provide both even-handed compensation of injured claimants and predictability for Fibreboard and its insurers—a result that has been achieved through the use of a no-opt-out (b)(1)(B) settlement class. The massive *Fibreboard* "futures" settlement, in other words, could not have been achieved had it been thought necessary to permit "opt-outs" and thereby lose the ability to bind all future claimants to the settlement. *See Ahern*, *supra*, Findings of Fact and Conclusions of Law (E.D. Tex. Sept. 28, 1993).

Continued viability of the no-opt-out "limited fund" approach used in *Fibreboard* and other recent settlements is thus critical to obtaining the fair and expeditious disposition of mass-tort litigation generally.

* * *

While the Ninth Circuit was not considering a Rule 23(b)(1)(B) "limited fund" settlement, its broad language could be read to require the right to opt out of *any* class settlement involving money damages. Accordingly, absent this Court's intervention, the utility of the "(b)(1)(B)" settlement as a device to resolve mass-tort claims is likely to be significantly undermined.

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* *Ahern* v. *Fibreboard*, *supra*. *See* Peter Kerr, *Two Insurers Settle on Asbestos*, N.Y. Times, Aug. 31, 1993, at D1; Greg Steinmetz & Marilyn Chase, *Fibreboard Sets Asbestos Accord With Insurers*, Wall Street Journal, Aug. 31, 1993, at A3.

SUMMARY OF ARGUMENT*

The Ninth Circuit erred to the extent its ruling extended this Court's decision in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), to require that opt-out rights be given to plaintiffs in class actions properly certified under Rule 23(b)(1) or 23(b)(2), Fed. R. Civ. P.

First, due process does not require that class plaintiffs be given the right to opt out of the inherently unitary class actions certified under Rules 23(b)(1) and (b)(2) generally. The holding in *Shutts*—which by its terms was limited to class actions "wholly or predominately for money judgments," 472 U.S. at 811 n.3, *i.e.*, actions of the type created in 1966 by Rule 23(b)(3)—is simply not applicable to the traditional class actions certified under Rules 23(b)(1) and (b)(2). *Shutts* cannot be read to undercut the longstanding rule, expressed in *Hansberry* v. *Lee*, 311 U.S. 32 (1940), that absent members of a class properly certified under the latter Rules are bound by a judgment with respect to that class, so long as their interests have been adequately represented. Moreover, this well-established rule holds true regardless of whether the issue is analyzed under the general procedural due process approach of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), or under the case law establishing the due-process requisites of personal jurisdiction.

Second, any opt-out requirement recognized in the case before this Court should not extend to limited-fund class

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* To avoid unnecessary duplication, *amici* will not add to Petitioners' argument—with which *amici* agree—that the opt-out right recognized in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), does not apply in federal-court class actions. *Amici* write separately, however, to stress a separate limitation on the holding in *Shutts* that applies to both federal-court and state-court class actions: the *Shutts* opt-out right, *amici* submit, is limited to "common question" class actions of the type created by Rule 23(b)(3) in 1966; it has no application to traditional, inherently unitary class actions—*i.e.*, those today certified under Federal Rules 23(b)(1)-(b)(2) or analogous state-law provisions.

actions certified under Rule 23(b)(1)(B). To require opt-outs in such class actions would entirely defeat the very purpose for which class-action treatment is afforded under that Rule: *viz.*, to prevent individual lawsuits brought by some class members from impairing the interests of other class members. Limited-fund situations thus present a uniquely compelling case for not requiring opt-out rights.

ARGUMENT

The Ninth Circuit appears to have held that "minimal procedural due process" requires the extension of opt-out rights to absent class members in *any* class action involving monetary claims—including actions (like the case at bar) certified under subdivisions (b)(1) and (b)(2) of Federal Rule 23. *Brown* v. *Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992).* The decision is wrong, at least insofar as it speaks to class actions certified under Rules 23(b)(1)-(b)(2) (or their state-law analogues), and should be reversed.

In holding that class plaintiffs must be accorded opt-out rights whenever they have damages claims, the Ninth Circuit has essentially declared unconstitutional subdivisions (b)(1) and (b)(2) of Rule 23: those provisions were designed to provide class members no opt-out rights, and they contain no "damages" exception. *See* Rule 23(c)(3); Advisory Committee's Note to Rule 23, 39 F.R.D. 98, 105 (1966); 7B Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Procedure* § 1789 (1986).

As the sole support for its holding, the Ninth Circuit relied upon a single, out-of-context phrase from this Court's opinion in *Shutts*, *supra*, 472 U.S. at 812, stating that the Due Process

* The Ninth Circuit's holding might also be read to apply only to classes involving "substantial" damages claims. *See Brown*, *supra*, 982 F.2d at 392. In either event, the lower court plainly did not limit its holding to the class of cases addressed in *Shutts*, *supra*, 472 U.S. at 811 n.3 —*i.e.*, class actions "predominately" for money damages.

Clause requires "that an absent plaintiff be provided with an opportunity to [opt out]." *See Brown*, *supra*, 982 F.2d at 392. This view of *Shutts* misreads both that case and the requirements of the Due Process Clause.

I. DUE PROCESS DOES NOT REQUIRE THE RIGHT TO OPT OUT OF THE INHERENTLY UNITARY CLASS ACTIONS CERTIFIED UNDER RULES 23(b)(1) AND 23(b)(2).

As noted, the Ninth Circuit appears to have read *Shutts* as holding that opt-out rights are an indispensable due-process incident of *any* class action involving monetary claims. That interpretation, however, betrays a clear misunderstanding of the decision in *Shutts*, which was explicitly limited to the problems raised by class actions "wholly or predominately for money judgments"*—*i.e.*, "common question" class actions of the sort first created in 1966 by Rule 23(b)(3). The long-established validity of the traditional no-opt-out class actions encompassed within Rules 23(b)(1) and (b)(2) is completely unaffected by *Shutts*.

A. *Shutts* does not undercut the longstanding rule that absent members of (b)(1) and (b)(2) classes are bound by a class judgment if their interests have been adequately represented.

In extending *Shutts*' pro-opt-out ruling *beyond* actions "wholly or predominately for money judgments," to cover *all* class actions with any monetary relief component, the Ninth

* "Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief." *Shutts*, *supra*, 472 U.S. at 811-12 n.3. *Compare* Advisory Committee's Note, *supra*, 39 F.R.D. at 102 (Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages").

Circuit ignored the fundamental distinction, recognized in both *Shutts* and Rule 23, between the traditional class actions encompassed within Rules 23(b)(1)-(b)(2) and the "common question" class action created in 1966 by Rule 23(b)(3). *See, e.g.*, Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1)*, 81 Harv. L. Rev. 356, 394 (1967) (contrasting "the more 'standard' class actions of (b)(1) and (2)" with "the difficult terrain of (b)(3)"). Nothing written in *Shutts* about such Rule 23(b)(3)-type class actions casts doubt on the long-established rule in traditional class actions that adequate representation, without more, satisfies the requirements of due process. *Hansberry*, *supra*, 311 U.S. at 41-43.

The mandatory (*i.e.*, no-opt-out) action under Rules 23(b)(1) and (b)(2) is the modern-day version of the traditional class action long recognized in Anglo-American law. It is necessitated by, and limited to, special circumstances in which numerous claims implicate a joint interest such that "inconsistency, prejudice, or inequity . . . would result to persons similarly situated *in the absence of a unitary adjudication of their common claims*." 1 *Newberg on Class Actions*, *supra*, § 1.20, at 1-48 (emphasis added). A prime example of the traditional "unitary" class action is that of numerous claims against a "limited fund." *See* Advisory Committee's Note, *supra*, 39 F.R.D. at 101.

In contrast, the "common question" actions governed by Rule 23(b)(3) are an innovation of the 1966 revision of the Federal Rules, combining what are essentially individual actions as to which "class-action treatment is not as clearly called for as in [(b)(1) and (b)(2) actions], but it may nevertheless be convenient and desirable." Advisory Committee's Note, *supra*, 39 F.R.D. at 102.

Mandatory class actions are predominantly equitable in nature. *See* 1 *Newberg on Class Actions*, *supra*, § 1.19 at 1-46. This is obvious in suits under Rule 23(b)(2) seeking "final injunctive relief or corresponding declaratory relief." It is equally true as to limited-fund cases under subdivision (b)(1)(B): "though they involve money claims individually," such cases are in essence actions "to allocate pro rata an available fund that is insufficient to pay all claims," and therefore "are equitable in nature." 1 *Newberg on Class Actions*, *supra*, § 1.19 at 1-47. *See also, e.g.*, *Johns-Manville*, *supra*, 129 B.R. at 832 (holding *Shutts* opt-out rights inapplicable in limited-fund context).

The mandatory class action of Rules 23(b)(1)-(b)(2) derives from an equitable mandatory class mechanism, the Seventeenth-Century English "bill of peace." *See* Arthur R. Miller & David Crump, *Jurisdiction & Choice of Law in Multistate Class Actions after Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 39-40 (1986). *See also* Zechariah Chafee, *Some Problems of Equity* 200-01 (1950) ("Class suits began as an offshoot of bills of peace with multiple parties"); 7A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1751 at 8 (1986) ("It was the English bill of peace that developed into what is now known as the class action."). The bill of peace was a chancery action to obtain essentially declaratory and injunctive relief resolving the potential claims of a large group of people. *See* Douglas Laycock, *Modern American Remedies* 346-47 (1985).

Class actions binding on class members who are not joined as parties to the action have been recognized in this country at least since *Smith* v. *Swormstedt*, 57 U.S. (16 How.) 288 (1854), in which representatives of a plaintiff class of some 1500 Methodist ministers residing in various jurisdictions sued to vindicate rights in a common fund. This Court upheld the maintenance of the suit on a representative basis, on the grounds that in cases involving "a common interest or a common right," a "court of equity permits a portion of the parties in interest to represent the entire body, *and the decree binds all of them the same as if all were before the court.*" *Id.* at 302-03 (emphasis added).

In the ensuing 140 years, this Court has consistently accepted the binding *res judicata* effect of judgments in traditional class actions provided that the absent class members were adequately represented. *See, e.g., Hartford Life Ins. Co.* v. *Ibs*, 237 U.S. 662 (1915); *Hartford Life Ins. Co.* v. *Barber*, 245 U.S. 146, 149 (1917); *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U.S. 356 (1921); *Sovereign Camp of the Woodmen of the World* v. *Bolin*, 305 U.S. 66, 78-79 (1938).

In short, long prior to *Shutts* this Court's decisions had made clear that traditional, unitary class actions—*i.e.*, no-opt-out actions of the type within subdivisions (b)(1) and (b)(2) of modern Rule 23—were a "recognized exception" to normal *in personam* requirements. *Hansberry, supra*, 311 U.S. at 40-41. As summarized in *Hansberry*, *adequacy of representation*, without more, is the key to binding absent class members by a class judgment:

> It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present.

Id. at 42-43.

The rules of procedure applicable in the federal courts have long reflected this traditional rule. In the years prior to the adoption of the Federal Rules of Civil Procedure, Federal Equity Rule 38 (adopted in 1912), under which "[l]imited fund and other no opt-out class actions were recognized," provided that " 'absent parties could be bound by . . . judgments pursuant to this provision.' " 1 *Newberg on Class Actions, supra*, § 1.09 at 1-24 (quoting *Johns-Manville, supra*, 129 B.R. at 804).

Similarly, with the 1938 promulgation of the Federal Rules of Civil Procedure and the merger of law and equity, original Rule 23 preserved the binding nature of traditional class actions. In addition, Rule 23 for the first time extended the

class-action mechanism to actions at law, and in doing so created a new category of non-binding class action. The Rule thus distinguished among three types of actions: "true," "hybrid," and "spurious." The first two of these categories were mandatory—*i.e.*, they encompassed the traditional binding, no-opt-out class actions recognized by the case law; the third, "spurious," category, was essentially a permissive joinder device, binding class members only if they affirmatively opted *into* the class. 1 *Newberg on Class Actions, supra*, § 1.09 at 1-26–1-27; 3B James W. Moore & John E. Kennedy, *Moore's Federal Practice* ¶ 23.31[1], at 23-235 (1992).

Finally, in the 1966 amendments to the Federal Rules, the "true" and "hybrid" categories were preserved in slightly modified form in the no-opt-out class actions of Rules 23(b)(1)-(b)(2); "spurious" actions were transformed into the present (b)(3) "common question" class action. *See* Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 43 (1967); 3B *Moore's Federal Practice, supra*, ¶ 23.31[1], at 23-235; *see also* 1 *Newberg on Class Actions, supra*, § 1.09 at 1-25 ("Antecedents of the modern limited fund class action may be found in the hybrid class suit [under prior Rule 23].").

The 1966 rule, in short, created a new type of binding class action by replacing the opt-*in* requirement for "spurious" actions with the current opt-*out* scheme applicable to Rule 23(b)(3) classes. *See* Rule 23(c)(2). Most importantly for present purposes, however, the new rule preserved the longstanding *Hansberry* principle that in *traditional* class actions (*i.e.*, actions under the new Rules 23(b)(1)-(b)(2)) adequate representation, without more, is sufficient to bind absent class members.

In upholding the innovation of the 23(b)(3)-type class action—and in expressly "intimat[ing] no view" as to actions *not* of that type (*i.e.*, *not* "wholly or predominately for money damages"), *Shutts, supra*, 472 U.S. at 811 n.3*—*Shutts* could

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* *Cf. Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 n.14 (1974) (expressly limiting holding "to class actions maintained under subdivision (b)(3)").

not have intended to cast doubt upon this well-established rule. As a leading authority on class actions has written, "[i]t is highly unlikely that the Supreme Court would have invalidated [Rules 23(b)(1)-(b)(2)] without expressly doing so." 1 *Newberg on Class Actions*, *supra*, § 1.19 at 1-49.

Indeed, far from denigrating the long-settled adequacy-of-representation standard governing the *res judicata* effect of traditional class actions, *Shutts* affirmatively *endorsed* that standard:

> *Hansberry* v. *Lee* . . . explained that a "class" or "representative" suit was an exception to the rule that one could not be bound by judgment *in personam* unless one was made fully a party in the traditional sense. . . . As the Court pointed out in *Hansberry*, . . . [t]he absent parties would be bound by the decree *so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest.*

Shutts, *supra*, 472 U.S. at 808 (emphasis added). And the Court has renewed this endorsement post-*Shutts*. *See Martin* v. *Wilks*, 490 U.S. 755, 761-62 & n.2 (1989) (citing *Hansberry*, *supra*, as having recognized that a nonparty will be bound by a judgment where "*his interests [are] adequately represented by [a party] with the same interests*") (emphasis added). *See also*, *e.g.*, 1 *Newberg on Class Actions*, *supra*, § 1.22 at 1-54.

Shutts, in short, rather than invalidating the traditional no-opt-out class actions encompassed within Rules 23(b)(1)-(b)(2), in fact reaffirms the adequacy-of-representation reasoning that justifies the binding nature of such actions. *Shutts*' language stating that opt-out rights are a necessary due-process incident of non-traditional (b)(*3*)-type class actions simply has no application to the other subdivisions of the Rule.

B. Mandatory class actions under Rules 23(b)(1) and (b)(2) provide absent class members with the process that is due.

This Court's due process case law confirms the validity of the rule, *see Hansberry*, *supra*, 311 U.S. at 41-43, that adequacy of representation, without more, suffices to bind absent class members to the judgment in a traditional class action brought under Rules 23(b)(1)-(b)(2) or a state-law analogue. This is true regardless of whether the issue is analyzed under the general procedural due process approach of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), or under the case law establishing the due-process requisites of personal jurisdiction.

Any attack on the validity of a Federal Rule of Civil Procedure must rebut a heavy presumption in favor of the Rule's constitutionality. *See Hanna* v. *Plumer*, 380 U.S. 460, 471 (1965).* Moreover, the well-established history of mandatory class actions is of great significance in determining what constitutes "due process of law," whether one views that historical practice as dispositive, *see*, *e.g.*, *Burnham* v. *Superior Court*, 495 U.S. 604, 619 (1990) (opinion of Scalia, J.), or merely as a "significant indicato[r] of what we as a people regard as fundamentally fair and rational." *Schad* v. *Arizona*, 501 U.S. ____, ____, 111 S. Ct. 2491, 2503 (1991) (plurality opinion); *accord Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1, 17-18 (1991).

1. *Mathews* v. *Eldridge*

The familiar test of *Mathews* balances:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the prob-

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* Indeed, in *Shutts* itself the Court rested its pro-opt-out decision in part on the argument that a more stringent "opt-in" requirement would necessitate the invalidation of a portion of Rule 23. *Shutts*, *supra*, 472 U.S. at 813-14.

> able value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, supra, 424 U.S. at 335. Where, as here, the issue concerns "disputes between private parties rather than between an individual and the government," the third *Mathews* factor is modified so that "principal attention" is paid to the interests of other affected private parties "with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections." *Connecticut* v. *Doehr*, 501 U.S. ____, ____, 111 S. Ct. 2105, 2112 (1991).

All three *Mathews* factors weigh in favor of the conclusion that opt-out rights are not constitutionally required in Rule 23(b)(1) and (b)(2) class actions. As to the first prong, *Shutts* itself recognizes that the "private interest" of an absent class member in avoiding out-of-state adjudication of his or her cause of action is considerably less than the interest of a defendant haled into a distant forum to defend himself or herself "upon pain of a default judgment." *Shutts, supra*, 472 U.S. at 809. "The burdens placed by a State upon an absent class-action plaintiff are not of the same order of magnitude as those it places upon an absent defendant." *Id.* at 808.

Second, the "risk of error" with which the next *Mathews* prong is concerned is significantly mitigated in class actions because class members' interests are protected by Rule 23's stringent requirements designed to ensure adequate representation of those interests. *See Martin, supra*, 490 U.S. at 761-62 & n.2 (adequate representation in class action permits "exception to the general rule" that every person is entitled to his or her own day in court); *Shutts, supra*, 472 U.S. at 808 (citing *Hansberry, supra*, 311 U.S. at 41, for the proposition that absent class members will be bound "so long as the named parties adequately

represented the absent class and the prosecution of the litigation was within the common interest"); *Hansberry, supra*, 311 U.S. at 42-43; *see also Kincade, supra*, 635 F.2d at 507-08 (no-opt-out (b)(2) class settlements do not violate due process, given adequate representation and other Rule 23 guarantees); *cf. Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950).*

While adequate representation is required under all subdivisions of Rule 23, the *Mathews* "risk of error" in precluding opt-outs will generally be less in actions qualifying for certification under Rules 23(b)(1) and (b)(2), on the one hand, than in those qualifying only under Rule 23(b)(3), on the other. This is so because of the greater degree of "cohesiveness" or "unity" that characterizes (b)(1) and (b)(2), as distinct from (b)(3), classes. *See, e.g. Walsh* v. *Great Atlantic & Pacific Tea Company, Inc.*, 726 F.2d 956, 963 & n.1 (3d Cir. 1983) ("Rule 23(b)(3) classes are less cohesive, and must abide by more stringent due process constraints."); *Holmes* v. *Continental Can Co.*, 706 F.2d 1144, 1157 (11th Cir. 1983) ((b)(3) classes are "pregnant with potential tensions and interest-antagonisms between class members"); 3 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 16.17, at 16-95 (1992). Given this interdependence of interests among class members in (b)(1) and (b)(2) class actions, there is logically little to be gained from the standpoint of due process in permitting such class members to exclude themselves from the class.

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* Moreover, where a class action is *settled*—as is true of both the case at bar and the typical mass-tort limited-fund class action—notice is given to the class regardless of the nature of the claims involved. Fed. R. Civ. P. 23(e). This notice is particularly potent and meaningful in terms of its due process value, in that it notifies class members of the proposed *outcome* of the class action, rather than merely making them aware of the pendency of the litigation generally. Should a member of the class be dissatisfied with the tendered settlement terms, he or she has a right to be heard and object. Accordingly, in the context of a settlement the "risk of error" with which the second *Mathews* prong is concerned is further reduced.

The third *Mathews* factor, focusing on the private and societal cost of requiring additional procedures, is particularly compelling in the case of mandatory class actions, in which class members' interdependent interests may be substantially impaired by the actions of opt-outs. As explained by Mr. Newberg:

> Because class actions under Rule 23(b)(1) or (2) are designed to avoid inconsistent adjudications or prejudice arising from separate suits by individuals similarly situated under special circumstances affecting groups of persons in common, they are analogous to interpleader or quasi-in-rem suits in which equitable circumstances dictate the need for a unitary adjudication regardless of the individual consent of the parties affected. The societal cost of permitting opt-outs for the purpose of individual adjudications in these inherent class action situations could be enormous, compared to the modest gains at best in constitutional terms for additional individual procedural rights. Thus, the opt-out due process right for class members in common question [*i.e.*, Rule 23(b)(3)] class actions, which *Shutts* held is tantamount to implied consent to jurisdiction in the absence of exercising such exclusion right after notice, would also seem to be an unnecessary element of procedural due process in class suits that are traditionally maintained on a no-opt-out basis, regardless of the individual consent of class members.

1 *Newberg on Class Actions*, *supra*, § 1.22, at 1-51. *See also* Advisory Committee's Note, *supra*, 39 F.R.D. at 100 ("The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class [in Rule 23(b)(1) actions] furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device.").

Because "[b]y definition, it is impossible to resolve separately individual claims involving common rights or limited funds," Miller & Crump, *supra*, 96 Yale L.J. at 40, the third prong of the *Mathews* balance weighs heavily in favor of the constitutionality of no-opt-out classes in such cases. "[T]he marginal gains from affording [the] additional procedural safeguard" are "outweighed by the societal cost of providing such a safeguard." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 320-21 (1985); *accord Mathews*, *supra*, 424 U.S. at 348; Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1276 (1975).

The considerable cost of providing an opt-out right in actions under Rules 23(b)(1) and (b)(2) contrasts with the minimal difficulty of providing such a right in "common question" class actions of the type at issue in *Shutts*. In such Rule 23(b)(3)-type actions, "class-action treatment is not as clearly called for . . . but it may nevertheless be convenient and desirable." Advisory Committee's Note, *supra*, 39 F.R.D. at 102. In these class actions, which typically combine related but separable damages claims, claims of class members who opt out may be adjudicated without prejudicing the rights of third parties or otherwise destroying the viability of class adjudication.

In short, applying the *Mathews* test establishes that Rule 23(b)(1) and (b)(2) class actions provide class members with all the protection the Due Process Clause requires.

2. Personal-jurisdiction cases

Even if personal-jurisdiction doctrine were to be regarded as requiring an analysis separate from that of *Mathews*, the traditional rule that class actions are an *exception* to generally applicable *in personam* requirements, *Hansberry*, *supra*, 311 U.S. at 40-41, comports with the requirements of due process. Indeed, *Hansberry*'s discussion of class actions in which absent parties could be bound without offending due process specifically included cases in which joinder of parties was "difficult

or impossible" because "some are not within the jurisdiction." *Id.* at 41.

Because a traditional common-right or common-fund class action under Rules 23(b)(1)-(b)(2) (or a state-law analogue) is inherently unitary, it would make no sense to examine the "minimum contacts" of each individual class member; rather, the forum chosen by a class plaintiff must be permitted to adjudicate the entire case, provided that it has a reasonable connection with the case *as a whole*.

Thus, in *Mullane* v. *Central Hanover Bank & Trust Co.*, *supra*—decided five years *after International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945)—this Court rejected a personal-jurisdiction challenge by nonresident beneficiaries of a New York trust (whose claims against both the trust and the trustee were being foreclosed by a New York proceeding) because the interest in obtaining a unitary and final adjudication of trust-related matters "can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified." *Mullane*, *supra*, 339 U.S. at 313-14.*

In other words, in the case of a traditional unitary class action of the type brought under Rules 23(b)(1)-(b)(2), so long as the forum has some reasonable relationship to the case as a whole there necessarily exists a sufficient " 'relationship among the [litigants], the forum, and the litigation,' " *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984) (quoting *Shaffer* v. *Heitner*, 433 U.S. 186, 204 (1977)), "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe*, *supra*, 326 U.S. at 316 (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940)).

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* Although not technically a class action, *Mullane* closely resembled a class suit in that the claims of numerous absent beneficiaries, many residing out-of-state, were adjudicated on a representative basis. *See id.* at 319.

In the present traditional class-action context, the sufficiency of this relationship between the case and the forum is to be measured by a version of the test set forth in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980), for measuring the "minimum contacts" between an individual *defendant* and the forum—*i.e.*, by balancing the burden on the out-of-state parties whose rights are being adjudicated (here, the absent members of a plaintiff class) against "the forum State's interest in adjudicating the dispute"; the interests of *other* members of the plaintiff class in "obtaining convenient and effective relief"; "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." *Id.*

In applying this analysis to class actions, as this Court explained in *Shutts*, any burden on absent plaintiffs must be seen as minimal, and largely obviated by the protections provided by class-action procedures. *Shutts*, *supra*, 472 U.S. at 808-14. Balanced on the other side is the forum's interest in adjudicating the action, which incorporates the interests of defendants, other plaintiffs, and "the interstate judicial system" in achieving unitary relief—all of which weigh most heavily in actions under subdivisions (b)(1) and (b)(2). For this reason, the ultimate personal-jurisdiction inquiry—whether it is "reasonable" to adjudicate the affected party's rights in a given forum, *World-Wide Volkswagen*, *supra*, 444 U.S. at 292—is plainly satisfied in mandatory class actions under Rules 23(b)(1)-(b)(2) so long as there is a reasonable connection between the forum and the action as a whole.*

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In view of the longstanding validity of traditional no-opt-out class actions; the basic distinction between mandatory and

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* To the extent that there may be other fora with *more* significant connections to the action, such venue-related concerns may be dealt with through the usual remedies of a transfer pursuant to 28 U.S.C. § 1404, or, in state court, a dismissal under the doctrine of *forum non conveniens*.

"common question" class actions recognized both historically and in the Federal Rules; the due process calculus under *Mathews*; and the clear precedent of *Hansberry*, *Shutts* cannot be read as finding Rules 23(b)(1) and (b)(2) in violation of the Due Process Clause.* The Ninth Circuit has simply misread *Shutts*.

II. ANY OPT-OUT REQUIREMENT RECOGNIZED IN THIS CASE SHOULD NOT EXTEND TO CLASS ACTIONS CERTIFIED UNDER RULE 23(b)(1)(B).

Even if the Court should be inclined to affirm the decision below, *amici* respectfully urge the Court to make clear that its decision does not reach the issue of limited-fund actions under Rule 23(b)(1)(B). Such actions and the settlements they promote present a uniquely compelling case for not requiring opt-out rights, a case that should not be foreclosed in an action not involving a (b)(1)(B) class.**

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* For cases upholding mandatory class actions under Rules 23(b)(1)-(b)(2), or similar state provisions, against due process attack, see *Nottingham Partners* v. *Dana*, 564 A.2d 1089 (Del. 1989); *In re Jackson/Lockdown MCO Cases*, 107 F.R.D. 703 (E.D. Mich. 1985); *Kincade*, *supra*, 635 F.2d 501; *Robertson* v. *National Basketball Ass'n*, 556 F.2d 682 (2d Cir. 1977); *Wetzel* v. *Liberty Mut. Ins. Co.*, 508 F.2d 239, 255-57 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); *see also Bell* v. *American Title Ins. Co.*, 277 Cal. Rptr. 583, 594-55 (Cal. App. 1991) (following *Nottingham Partners*).

** The class action that underlies this case, *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 815 F.2d 695 (3d Cir. 1987) (mem. op.), *cert. denied*, 485 U.S. 909 (1988), was *not* a Rule 23(b)(1)(B) limited-fund action. Rather, the district court certified a class under Rules 23(b)(1)(A) and 23(b)(2) because "there was serious risk that different courts would fashion different and incompatible means of restructuring the title insurance industry, and that the relief provided by the settlement was *primarily* injunctive." *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 764 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989) (emphasis added) (quoting portion of the original district court order). The settlement in the case was "hybrid"—*i.e.*, it resolved both a claim for prospective injunctive relief and a claim for retrospective monetary damages. *Id.* at 768.

In class actions of the sort at bar, essentially separate damages claims may appropriately be swept within the mandatory class framework of Rules 23(b)(1)-(b)(2) because they are ancillary to a unitary *non*damages claim. *See* 1 *Newberg on Class Actions*, *supra*, § 1.22 at 1-51 n.188. In contrast, the individual damages claims in Rule 23(b)(1)(B) limited-fund class actions are not ancillary to some other relief that necessitates unitary class-action treatment; rather, the equitable apportionment of the damages claims *themselves* is what makes unitary treatment necessary.

To allow opt-outs from Rule 23(b)(1)(B) classes would completely defeat the purposes of this class-action mechanism, and would significantly impair the chances of settling mass-tort actions. As one district court has put it, "unless limited fund class actions are mandatory 'large numbers of plaintiffs could opt out and continue to exhaust the limited fund through the filing of their own lawsuits.' " *Johns-Manville*, *supra*, 129 B.R. at 832 (quoting *Waldron* v. *Raymark Industries, Inc.*, 124 F.R.D. 235, 237 (N.D. Ga. 1989)). Thus, the notion of opt-out rights in a limited-fund "mandatory class 'besides being oxymoronic, is contrary to the very purpose for which a Rule 23(b)(1)(B) class is meant to serve.' " *Johns-Manville*, *supra*, 129 B.R. at 832 (quoting *Waldron*, *supra*, 124 F.R.D. at 238 n.1); *cf. In re A.H. Robins*, *supra*, 880 F.2d at 746 (to permit "claimants who are seeking actually to promote their own interests largely at the expense of the other claimants to frustrate a class certification in [a mass-tort] case is unthinkable").

For this reason,

> even the most consistent advocates of the traditional individual method of adjudication recognized that limited fund situations represent special circumstances in which the loss of individual control is justified . . . . When a

> limited fund exists, the individual's interest in controlling his or her claim is outweighed by the interest of each class member in receiving an equitable share of the limited funds available.

Steven L. Schultz, *Mass Torts: In re Joint Eastern and Southern District Asbestos Litigation; Bankrupt and Backlogged—A Proposal for the Use of Federal Common Law in Mass Tort Class Actions*, 58 Brooklyn L. Rev. 553, 596 (1992).

Thus, Rule 23(b)(1)(B) class actions present the strongest possible justification—even as compared with other traditional class actions—against requiring an opt-out right under the Due Process Clause. Under the third *Mathews* v. *Eldridge* prong, which measures the "burdens that the additional or substitute procedural requirement would entail," *Mathews*, *supra*, 424 U.S. at 335, the potentially drastic consequences of permitting opt-outs in (b)(1)(B) actions makes for a uniquely compelling case against such opt-outs. Similarly, from a personal-jurisdiction standpoint, in a limited-fund case "the nexus between the fund, the claimants, and the action supports the exercise of jurisdiction over claimants even against their will." Miller & Crump, *supra*, 96 Yale L.J. at 52.

In short, in view of the pressing need for unitary treatment of Rule 23(b)(1)(B) cases, "[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified." *Mullane*, *supra*, 339 U.S. at 313-14. Thus, although *amici* believe that the Ninth Circuit erred in deciding the instant case, *amici* also believe that it is of crucial importance, if this Court should choose to affirm the judgment below, that the Court not cast doubt upon the continuing validity of mandatory class actions under Rule 23(b)(1)(B).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the judgment below and reaffirm the constitutionality of no-opt-out class actions pursuant to subdivisions (b)(1) and (b)(2) of Federal Rule of Civil Procedure 23.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TICOR TITLE INSURANCE CO., *et al.*,
Petitioners,

v.

WALTER THOMAS BROWN AND JEFFREY L. DZIEWIT
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

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Boyd v. Bechtel Corp., 485 F. Supp. 610 (N.D. Cal. 1979) 15
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Cox v. American Cast Iron Pipe Co., 784 F.2d 1546 (11th Cir. 1986) 7, 19
DeGier v. McDonald's Corp., 76 F.R.D. 125 (N.D. Cal. 1977) 19
Dimick v. Schiedt, 293 U.S. 474 (1935) 10
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Fowler v. Birmingham News Co., 608 F.2d 1055 (5th Cir. 1979) 19
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Grand Chute v. Winegar, 82 U.S. 373 (1872) 10
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Johnson v. General Motors Corp., 598 F.2d 432 (5th Cir. 1979) 4, 18
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Lyon v. Mutual Benefit Assoc., 305 U.S. 484 (1939) 10
Martin v. Wilks, 490 U.S. 755 (1989) 6
Matthews v. Eldridge, 424 U.S. 319 (1976) 8
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 4, 5

Officers for Justice v. Civil Service Commission, 688 F.2d 615, 634-35 (9th Cir. 1982) 16
Ostapowicz v. Johnson Bronze Co., 54 F.R.D. 465 (W.D. Pa. 1972) 19
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Penson v. Terminal Transport Co., 634 F.2d 989 (5th Cir. Unit B 1981) 16, 18
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Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 4, 5
Plummer v. Chemical Bank, 91 F.R.D. 434 (S.D.N.Y. 1981) 12
Sosna v. Iowa, 419 U.S. 393 (1975) 20
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Wetzel v. Liberty Mut'l Insur. Co., 508 F.2d 239 (3d Cir. 1975) 22
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Other Authorities

American Bar Ass'n, Code of Prof. Responsibility 14
Arnold, A Historical Inquiry Into the Right to Trial By Jury in Complex Civil Litigation, 128 U. Pa. L. Rev. 829 (1980) 11
Coffee, Understanding the Plaintiff's Attorney, 86 Colum. L. Rev. 669 (1986) 14
Coffee, The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877 (1987) 15
Developments in the Law---Class Actions, 89 Harv. L. Rev. 1318 (1976) 14
Grosberg, Lawrence M., Class Actions and Client-Centered Decisionmaking, 40 Syr. L. Rev. 709 (1989) 6, 8
Kane, Mary Kay, Of Carrots and Sticks: Evaluating the Role

of the Class Action Lawyer, 66 Texas L. Rev. 385 (1987) 12, 13
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Note, The Propriety of Class Actions in Mass Aviation Disaster Litigation, 56 J. Air L. & Comm. 559 (1990) ... 13
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Pound, The Development of Constitutional Guarantees of Liberty (1957) 11
Rhode, Class Conflicts in Class Actions, 34 Stan. L. Rev. 1183 (1982) 11, 14
Rosen, Gerald E., Title VII Classes and Due Process: To (b)(2) or Not to (b)(3), 26 Wayne L. Rev. 919 (1980) 7, 22
Rutherglen, Notice, Scope and Preclusion in Title VII Class Actions, 69 Va. L. Rev. 11 (1983) 9
Wright and A. Miller, Federal Practice & Procedure (1972).. 16
Wright, Charles A., Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure (2d ed. 1986) 16

IN THE

Supreme Court of the United States

October Term, 1993

No. 92-1988

TICOR TITLE INSURANCE CO., *et al.*,
Petitioners,

v.

WALTER THOMAS BROWN AND JEFFREY L. DZIEWIT
Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association whose approximately 60,000 members primarily represent injured plaintiffs in civil actions. ATLA members have served as class counsel as well as attorneys for class members.

Written consents of both parties to the filing of this brief have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Procedural due process demands that parties in civil actions, including class actions, be afforded notice and an opportunity to be heard. Meaningful notice in the context of a class action includes the opportunity to opt out of the lawsuit.

The crucial factor in determining whether to afford members of a plaintiff class the opportunity to opt out of the litigation is the weight of the individual interest at stake.

Although the class action device offers certain advantages in resolving large numbers of claims, it eliminates the ability of the client to control the prosecution of his or her own cause of action. The individual has a strong interest in having an opportunity opt out of class litigation at the initial stage in order to preserve a minimum degree of autonomy with respect to the claim. Judicial scrutiny of the adequacy of representation afforded the class does not protect the interests of individual claimants in deciding whether to participate in the litigation at all.

The individual also retains a strong interest in the opportunity of opt out of a class action to protect himself or herself from the effects of potential conflicts of interest with class counsel. The interest of the individual client, which provides a reference point for professional ethical conduct in individual civil actions, is missing in the class action context. As a result, class counsel is subject to pressure to promote a settlement that subordinates the interests of some class members to the interests of the majority, maximizes attorney fees, or suggests collusion with the defendant.

Judicial scrutiny of the adequacy of representation of the class may not provide sufficient protection to individual claimants. The opportunity to remove themselves from the litigation may represent the only practical recourse for dissatisfied class members. Moreover, the fact that the opt

out is available to class members may provide an incentive for class counsel to deal with class members as equitably as possible.

These strong individual interests are not limited to members of classes certified under Fed. R. Civ. Pro. 23(b)(3), which expressly provides for notice and opt-out. In practice, courts have recognized that fairness may demand that these safeguards be extended to members of Rule 23(b)(2) classes which seek monetary damages. Courts have used their discretionary authority to provide opt-out procedures under such circumstances. In view of the strength of the individual interest at stake, this Court should expressly recognize that such procedures are constitutionally required.

ARGUMENT

I. PROCEDURAL DUE PROCESS REQUIRES THAT MEMBERS OF A PLAINTIFF CLASS SEEKING MONETARY DAMAGES BE AFFORDED NOTICE AND THE OPPORTUNITY TO OPT OUT OF THE LITIGATION

A. Due Process Requires That Members of a Plaintiff Class Be Afforded Notice and An Opportunity to Be Heard.

Despite the complexity of the procedural history of this lawsuit, the question before this Court is fairly narrow and well-defined: Does due process require that members of a plaintiff class seeking monetary damages, certified under Fed. R. Civ. Pro. 23(b)(2), be afforded notice and an opportunity to opt out of the lawsuit?

The prior judgment which Petitioners seek to enforce, *In re Real Estate Title and Settlement Services Antitrust Litigation*, MDL No. 633, may not be given res judicata

effect if that judgment did not comport with due process. *Johnson v. General Motors Corp.*, 598 F.2d 432 (5th Cir. 1979), *citing Hansberry v. Lee*, 311 U.S. 32 (1942). ATLA urges the Court to uphold the determination by the Ninth Circuit that Respondents are not bound by the earlier judgment because they were not afforded the opportunity to exclude themselves from that class action.

Plaintiffs and defendants are both entitled to procedural due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), this Court determined that notice and an opportunity to be heard were fundamental requisites of the constitutional guarantee of procedural due process. The Court in *Mullane* cautioned that the constitution is not satisfied by empty formality. "[W]hen notice is a person's due, process which is a mere gesture is not due process." 339 U.S. at 314-15.

Specifically addressing the rights of the members of a plaintiff class, the Court declared in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) that notice is an absolute requisite to the maintenance of 23(b)(3) actions. The Court stated that "notice to identifiable class members is not a discretionary consideration" but is "rather an unambiguous requirement of Rule 23." 417 U.S. at 176. The court required that notice be sent to over two million class members, specifically so that each would have an opportunity to "request exclusion from the action and thereby preserve his opportunity to press his claim separately." 417 U.S. at 176.

In *Eisen*, the Court made it clear that the notice requirement is applicable to class actions. Moreover, the Court indicated that the purpose of notice, in the class action context, is to afford class members the opportunity to opt out of the lawsuit. *Eisen*, of course, involved a class action for monetary damages certified under Rule 23(b)(3), which

expressly provides that class members be afforded notice and an opportunity to opt out. This Court has made it clear, however, that these procedural requirements are based not only in the text of the rule, but also on the command of the Due Process Clause. *See*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) In the present case ATLA urges the Court to hold that members of a class seeking monetary damages are similarly entitled to notice and the opportunity to opt out where the class was certified under Rule 23(b)(2), which does not explicitly provide for those procedures.

B. Meaningful Notice in the Context of a Class Action Must Include the Opportunity for Class Members to Exclude Themselves From the Lawsuit.

The *Mullane* Court emphasized that the constitutional right to notice "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." 339 U.S. at 314. In *Eisen* the Court required that notice be sent to over two million class members, specifically so that each would have an opportunity to "request exclusion from the action and thereby preserve his opportunity to press his claim separately." 417 U.S. at 176.

The procedural safeguards clearly have a constitutional foundation. The Advisory Committee's Note to Rule 23 explains that "mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill the requirements of due process to which the class action procedure is of course subject." 28 U.S.C.A. Rule 23 (Adv. Comm. Note). In *Eisen*, the Supreme Court endorsed the Advisory Committee's position that the notice provisions of Rule 23 are "designed to fulfill requirements of due process." 417 U.S. at 173. Notice and the opportunity to opt out may be viewed as a specific application of a fundamental principle of fairness -- that no one can be bound

by the judgment in an action without his or her consent. *See, Martin v. Wilks*, 490 U.S. 755, 762 (1989). As Professor Grosberg points out, however, this leads to an anomaly in Rule 23:

> The rule 23 framework is paradoxical in that the rule requires notice to class members and an opportunity to opt out of Rule 23(b)(3) class actions, whereas no such notice is required nor is a chance to opt out afforded to class members in Rule 23(b)(1) or (b)(2) class actions. Thus, in Rule 23(b)(3) class actions, assuming there is actual notice, there is consent of sorts (either tacit or explicit) of all class members. A Rule 23(b)(1) or (b)(2) class action does not require even this limited form of consent.

Lawrence M. Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 Syr. L. Rev. 709, 745, n. 165 (1989)

In this case, the Court is called upon to resolve that anomaly. The historical development of the class action remedy and the constitutional underpinnings of the notice and opt-out requirements are compellingly set forth in the Brief of Respondent and in the amicus briefs of Trial Lawyers for Public Justice and Public Citizen. ATLA will not burden the Court with lengthy repetition of those arguments.

It is worth noting, however, that nothing in the text of the rule precludes a district court from protecting the due process rights of Rule 23(b)(2) class members by ordering notice and opt-out where, as in the present case, claims for monetary damages are asserted in a context that closely resembles a Rule 23(b)(3) class action. *See, e.g., Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986)(approving the opt-out procedures in Rule 23(b)(2) class actions). Petitioners argue that explicitly recognizing these constitutional safeguards would undermine the usefulness of the class action device. Brief of Petitioner at 26-

28. Even if this speculation were well-founded, this Court has long insisted that the advantages of class actions may not constitutionally be gained at the expense of the due process rights of individual class members. *Hansberry v. Lee*, 311 U.S. 32, 42 (1940). *See* Gerald E. Rosen, *Title VII Classes and Due Process: To (b)(2) or Not To (b)(3)*, 26 Wayne L. Rev. 919, 926 (1980).

II. THE INDIVIDUAL'S INTEREST IN MAINTAINING AUTONOMY OVER A CAUSE OF ACTION AND IN ASSURING ADEQUACY OF REPRESENTATION BY CLASS COUNSEL MANDATE NOTICE AND OPPORTUNITY TO OPT OUT AS A MATTER OF DUE PROCESS.

A. An Opportunity to Exclude Oneself From Litigation Instituted On One's Behalf Without One's Consent Is Essential to the Individual's Fundamental Right to Autonomy In the Conduct of Civil Actions.

A critical issue before this Court in determining whether the Due Process Clause includes the right to opt out of a class action is the weight that should be accorded to the individual interest under the balancing test prescribed in *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). Ticor argues that this interest "is not entitled to much weight." Brief of Petitioner at 10. Petitioner further maintains that this interest is fully protected by the judicial determination under Rule 23 of the adequacy of representation. *Id.*

ATLA members have gained an appreciation of the individual's interest through their representation of individuals in actual class actions. Some ATLA members serve as class counsel; others frequently represent class members who are faced with the loss of an otherwise meritorious cause of action based upon a judgment in a class

action brought on their behalf. This experience reinforces ATLA's belief in the basic principle that

> The integrity, autonomy and dignity of the person is protected when clients make the decisions affecting their lives. As the owner of a legal claim, the client should have a 'presumptive right of control.' It is 'the client who will have to live with the outcome.'

Lawrence M. Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 Syr. L. Rev. 709, 719 (1989) (footnotes omitted). The right to participate in one's own litigation clearly has constitutional dimensions. Note, *Due Process: Accuracy or Opportunity?*, 65 So. Calif. L. Rev. 2705, 2714 (Sept. 1992).

In a traditional civil action for money damages, the client is the master of his or her own cause of action. This principle serves as the pole star, defining the plaintiff's attorney's course of professional ethical conduct. No one would deny that the client is entitled to decline to file a lawsuit, despite the attorney's belief in the merits of the claim. The plaintiff is equally entitled to withdraw from the lawsuit, even in the face of counsel's advice. The client may have a good reason, bad reason, or no reason at all for this decision. The power to walk away from a civil action also serves to enhance the client's control over the course of the litigation.

The class action device serves a number of valuable goals in the civil justice system. In some situations, it may provide a remedy for those whose claims could not otherwise be adjudicated. But permitting the aggregation of claims in this fashion exacts a price. "Ordinary notions of client control, let alone participation in decisionmaking, are not viable in class actions." Grosberg, *supra*, at 786. From the trial lawyer's perspective, the pole star representing the wishes of the client fades and disappears into the diffuse "interest of the class."

ATLA does not suggest that the full measure of client control be replicated in the class action context. However, a minimum level of client control can be preserved by affording class members the opportunity to "vote with their feet" at the initial formal stage of the lawsuit. The right to opt out allows class members to express their dissatisfaction by abandoning the class action entirely. Rutherglen, *Notice, Scope and Preclusion in Title VII Class Actions*, 69 Va. L. Rev. 11, 26-27 (1983). Equally important, a real threat that a significant portion of the potential class may exercise this option may act as an incentive for class counsel to consult with class members in a meaningful way. In this fashion, the opt-out right can provide guidance to class counsel as well as preserve a measure of client autonomy.

B. Judicial Scrutiny of the Adequacy of Representation of the Class Does Not Protect the Individual's Right to Autonomy In the Conduct of Civil Actions.

Petitioner argues that any interest on the part of the individual in preserving some control over the litigation is fully protected by the requirement in Rule 23 that the court assure the adequacy of representation of the class. Brief of Petitioner at 10. ATLA submits that the individual's interest in not participating in the class action is not addressed by the adequacy determination.

An individual who possesses a cause of action for monetary damages may, for a variety of reasons, reject adjudication of his or her claim as part of a class action. The individual may desire to pursue that claim in an individual action. Not every plaintiff class seeking monetary damages is made up of claims that would not be economically viable in separate actions. Some may justifiably believe that a separate suit holds a better prospect for full compensation.

Some may strongly desire to present their case to a jury. This Court has historically championed the right to trial by jury, cautioning that "it is only in exceptional cases and for specific causes that a party may be deprived of it." *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872). *See also*, *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354 (1943) ("The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence"); *Lyon v. Mutual Benefit Assoc.*, 305 U.S. 484, 492 (1939)("It is essential that the right to trial by jury be scrupulously safeguarded"); *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)("any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care").

This right is of particular significance in light of the broad powers accorded district courts in steering and shaping class actions. Indeed, the specific target of drafters of the Seventh Amendment, as reflected by the constitutional text, is the power of the judiciary, reflecting the colonists' bitter experience with autocratic judges. *See*, Roscoe Pound, The Development of Constitutional Guarantees of Liberty 69-72 (1957); Arnold, *A Historical Inquiry Into the Right to Trial By Jury in Complex Civil Litigation*, 128 U. Pa. L. Rev. 829, 832-35 (1980). The right to trial by jury is essentially a check on the power of the federal judiciary. *See*, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979)(Rehnquist, J., dissenting); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 83 (1989)(White, J., dissenting)("The function of the civil jury is to diffuse the otherwise autocratic power and authority of the judge"). The opportunity to opt out of a class action for purposes of exercising one's Seventh Amendment right should not depend upon whether the class action was classified as a Rule 23(b)(2) or Rule 23(b)(3) proceeding.

Class members may determine that it is in their best interests not to prosecute an otherwise meritorious claim at all. The decision not to sue is also worthy of due process protection. *See*, Note, *Due Process and Equitable Relief in*

State Multistage Class Actions After Phillips Petroleum Co. v. Shutts, 68 Tex. L. Rev. 415, 439 (1989). It is not unreasonable that some workers may view the prospect of prevailing in a class action against their employer as not worth the adverse impact on relations with management and co-workers. *See* Rhode, *Class Conflicts in Class Actions*, 34 Stan. L. Rev. 1183, 1187-88 (1982). Shareholders may conclude that the adverse impact of a class judgment against their corporation outweighs the value of the damages sought. Similar concerns may lead individuals to forego the chance to recover relatively small amounts against governmental or publicly-funded entities in view of the realization that the burden of satisfying the judgment, augmented by litigation costs, will ultimately fall upon them as residents or taxpayers.

Obviously, a judicial determination that the class was adequately represented does little to safeguard the interests of class members who, for whatever reason, would reject the class action altogether. This practical limitation on the adequacy determination supports this Court's statement in *Eisen* that adequate representation alone is not the "touchstone of due process." *Eisen*, *supra* at 176. To suggest that adequate representation by itself was sufficient for due process, the Court stated, would "prove too much" because it would lead to the conclusion that no notice was necessary provided that there was adequate representation of the members of the class. *Id.* at 176-77.

C. The Opportunity to Opt Out of Class Actions Affords Class Members Some Protection Against Representation That Is Contrary to Their Interests.

One commentator has observed:

> Two features of class actions that most distinguish them from two-party suits are the degree of management

> required and the problems of client control and conflicts of interest. These two general, yet unique, characteristics of class litigation explain some of the peculiar pressures placed upon the modern class action lawyer....

Mary Kay Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 Texas L. Rev. 385, 389 (1987).

While problems of client control were addressed in the previous sections, ATLA is also concerned with the potential conflicts of interest which arise in the class action context. These frequently surface in connection with the settlement of the class action. *Wyatt v. Horsely*, 793 F. Supp. 1053, 1055 (M.D. Ala. 1991)("The settlement process in class actions is more susceptible than adversarial adjudications to certain types of abuse.")

These include the incentive to favor one set of class members to the detriment of others. *See, e.g., Franks v. Kroger Co.*, 649 F.2d 1216, 1226 (6th Cir. 1981)(reversing the district court's approval of a settlement when "the 'preferred position' of the named plaintiffs should have signaled the district court of potential inequities in this proposed settlement"); *Plummer v. Chemical Bank*, 91 F.R.D. 434, 441-42 (S.D.N.Y. 1981)(rejecting the settlement in an employment discrimination case because the named plaintiffs received favorable monetary awards and promotions, and plaintiffs' attorney received a large fee, while the plaintiff class received nothing previously unavailable to them under the employer's affirmative action program).

Additionally, some attorneys may tend to compromise high-stake plaintiffs claims to further the settlement process. Note, *The Propriety of Class Actions in Mass Aviation Disaster Litigation*, 56 J. Air L. & Comm. 559 (1990). As one commentator explains, "Plaintiffs whose claimed injuries are near or below the mean may find it expedient to sell out

the high-stakes plaintiff by negotiating a class settlement with the defendants on a basis that increases the minimum recovery but lowers the maximum recovery per plaintiff." Note, *Class Actions in the Asbestos Contest: Balancing the Due Process Considerations Implicated by the Right to Opt Out*, 70 Tex. L. Rev. 211, 222 (1991).

There is the inclination by class counsel to promote a settlement which maximizes his or her fees.

> In a class suit, because of the absent member's attenuated relationship to the litigation, they may not know whether a compromise favors greater attorneys' fees and lesser benefits for them. Professor Wolfram has noted that "most [class action] lawyers regard themselves as entrepreneurs and largely act accordingly"; their self-interest can be restrained only by client control. If he is correct, then nothing in the class setting prevents attorneys from following their "natural inclinations," compromising the absent members' interests in order to receive larger fees.

Mary Kay Kane, "Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer," 66 Texas L. Rev. 385, 395-96 (1987).

Frequently counsel operates under considerable pressure to enter into a collusive settlement with the defendant. *See* Coffee, *Understanding the Plaintiff's Attorney*, 86 Colum. L. Rev. 669, 714-16 (1986).

Amicus, as an organization of trial attorneys, is especially concerned with the roles of plaintiffs and their attorneys in the class action process. In the context of individual-plaintiff litigation the roles of the attorney and the client are well defined. The A.B.A. Code of Professional Responsibility envisions the attorney as an advocate of the interests of the client. American Bar Ass'n, Code of Professional

Responsibility, Ethical Consideration (hereinafter "EC") 7-1. Although the lawyer has some freedom to make tactical choices during litigation without consulting his or her client, the lawyer is expected to defer to the client's wishes on major litigation decisions. *See* ABA Code EC 7-1, EC 7-7, EC 7-9. It remains unclear whether this model can be carried over to the class action context, as no generally accepted and enforceable concept of the allocation of decision-making responsibility between the attorney and the class members has yet emerged. *See generally, Developments in the Law--- Class Actions*, 89 Harv. L. Rev. 1318, 1578 (1976).

Even if the class attorney were diligent in trying to represent all interests, there is generally a lack of clearly identifiable client interests in a class action. Rhode, 34 Stan. L. Rev. at 1183. As the Fifth Circuit has stated, "the traditional notion of the client deciding important litigation questions is often problematic in the class action context because of the difficulty in identifying the client." *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 (5th Cir. 1978).

Although judges are responsible for policing settlements, they rarely set them aside. *See* Coffee, *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 895 (1987). In fact, courts often accord great weight to the opinion of counsel for the class in approving class action settlements. *See Pettway, supra*, 576 F.2d at 1215 ("trial court is entitled to take account of the judgment of experienced counsel for the parties"); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *Wyatt v. Horsely*, 793 F. Supp. 1053 (M.D. Ala. 1991). Thus, while class action procedures technically include some checks on the settlement process, class members are generally dependent on the good faith efforts of the class attorney for their remedies. *See also Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)(recognizing the potential conflict between attorneys

and the class they represent); 7A C. Wright and A. Miller, *Federal Practice & Procedure* § 1797, p.183 (1972).

It is no denigration of the federal judiciary to recognize that class members may often be more sensitive to potential conflicts between their interests and those of class counsel. Those who fear that their interest in full recovery will be subordinated to the interests of the majority in reaching a settlement can protect themselves by opting out of the litigation. Those who are not confident in the undivided loyalty of class counsel can, in effect, fire their attorney by opting out. The possibility that class members may "vote with their feet" may provide some incentive for class counsel to deal forthrightly with all class members.

III. THE DUE PROCESS PROTECTIONS OF NOTICE AND OPPORTUNITY TO OPT OUT SHOULD BE EXTENDED TO MEMBERS OF CLASS ACTIONS CERTIFIED UNDER FED. R. CIV. PRO. 23(B)(2) WHICH SEEK MONETARY DAMAGES

The issue before this Court is whether the safeguards of notice and an opportunity to opt out of the litigation provided to members of Rule 23(b)(3) classes should also be available to members of classes certified under Rule 23(b)(2) as a matter of fundamental fairness. Certainly the individual's interest in preserving some minimal level of autonomy and control over his or her own cause of action is not limited to members of Rule 23(b)(3) classes.

A. Federal Courts, Recognizing That Fairness Mandates Affording the Opportunity to Opt Out, Have Exercised Their Discretionary Authority to Provide that Safeguard Where Not Expressly Required by Rule 23.

ATLA suggests that the experience of a number of federal courts facing this question is instructive. Those courts have attempted to satisfy the demands of fairness by employing their considerable discretion to extend these safeguards beyond the extent demanded by the text of the Rule.

For example, in *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992) the Second Circuit warned that an "overbroad framing of the class may be so unfair as to approach, if not amount to, deprivation of due process." *Id.* at 1337-38, *citing Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1126-27 (5th Cir. 1969). In *Haitian Centers*, the Second Circuit declined to apply the doctrine of collateral estoppel based on a finding that the class defined in the case was overly broad and there had been antagonistic interests within the class that should have been handled by redefining the class or creating subclasses under Rule 23(c)(4). 969 F.2d at 1337, *citing* Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil* § 1775 at 457 (2d ed. 1986).

Courts have also shown an increasing "concern with providing the due process rights of the individual class members" in Rule 23(b)(2) class actions. *Penson v. Terminal Transport Co.*, 634 F.2d 989, 994 (5th Cir. Unit B 1981). Similarly in *Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 634-35 (9th Cir. 1982), a Title VII class action certified under subsection (b)(2), the Ninth Circuit allowed an opting out in part because "[g]iven the breadth and nature of the claims asserted, the class allegations in plaintiffs' complaint, and the procedures adopted by the district court, it appears clear that this case was in essence a Rule 23(b)(3) action."

In *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983) the court went even further and held that "the presence in the lawsuit of a significant number of atypical

claims not common to the class activates a requirement that absent class members be given an opportunity to opt out of the class at the monetary stage of the Title VII lawsuit or settlement." 706 F.2d at 1155. In the court's view, refusing to provide an opportunity to opt out of the class at the monetary relief stage of a Title VII lawsuit or settlement was an abuse of discretion. "Because the monetary relief stage of this particular Title VII case [was] functionally more similar to a (b)(3) class than a (b)(2) class, the opt out protection of (b)(3) must be applied." 706 F.2d at 1155.

In concluding that a right to opt out was required, the *Holmes* court examined the distinctions between the (b)(2) and (b)(3) actions. It found that the very nature of a (b)(2) class was that it was homogeneous without any conflicting interests between the members of the class. *See also Allen v. Isaac*, 100 F.R.D. 373, 375-77 (N.D.Ill. 1983)(court exercised its discretion under Rule 23(d)(2) to permit class members to opt out, where it concluded that a 23(b)(2) action was, in reality, a hybrid 23(b)(2)-and-23(b)(3) action.

In cases where monetary damages as well as injunctive relief is sought by class action plaintiffs, many courts and commentators find that the notice provisions of 23 (b)(3) are appropriate. In *Johnson v. General Motors Corp.*, 598 F.2d 432 (5th Cir. 1979) the Fifth Circuit held that a prisoner who had received no notice of a class action was not precluded from adjudicating his claim for monetary damages. The court stated that while "under the text of Rule 23 and the cases interpreting it notice is not required in all representative suits in order to bind absent class members, due process requires that it be provided before individual monetary claims may be barred." 598 F.2d at 437. The court reasoned that this holding "does no violence to the general rule making notice only discretionary in Rule 23(b)(2) cases" because "the decisions from which that rule derives presuppose that Rule 23(b)(2) class actions will be limited to class suits seeking only equitable relief." *Id.* at 437. When "only equitable relief

is sought in an action involving a cohesive plaintiff group such as a class of black employees at an assembly plant, the due process interest of absent members will usually be safeguarded by adequate representation alone." *Id.* at 437. By contrast, in cases where "individual monetary claims are at stake, the balance swings in favor of the provision of some form of notice. *Id.* at 438. *Accord, Bogard v. Cook*, 586 F.2d 399 (5th Cir. 1978), cert. denied, 444 U.S. 883 (1979).

The Fifth Circuit and Eleventh Circuit Courts, among others, have acknowledged that "the monetary relief stage of a Title VII case often 'begins to resemble a 23(b)(3) action' and that courts have shown increasing 'concern for providing for the due process rights of individual class members.'" *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1154 (11th Cir. 1983), *citing Penson v. Terminal Transport Co., supra*, and *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974).

Other courts have exercised their discretionary powers in certain circumstances to require that 23(b)(2) class members receive notice and an opportunity to opt-out of the litigation. *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986)(approving the opt-out procedures in Rule 23(b)(2) class actions as provided for in *Penson* and *Holmes*); *Fowler v. Birmingham News Co.*, 608 F.2d 1055, 1059 (5th Cir. 1979)(the opportunity to opt out of the class served to ameliorate any "antagonistic interests" between the class representatives and the absent members); *Bogard v. Cook*, 586 F.2d 399, 409 (5th Cir. 1978)(the opt-out right was designed to permit the class members to seek monetary relief in individual actions if they so chose rather than be limited to the injunctive relief sought in the class action); *Bauman v. United States Dist. Court*, 557 F.2d 650, 659-60 (9th Cir. 1977)(District Court's order permitting Title VII class plaintiff to opt out of Rule 23(b)(2) class was not erroneous as a matter of law); *DeGier v. McDonald's Corp.*, 76 F.R.D. 125 (N.D. Cal. 1977); *Walker v. Styres Indust.*, 21 Fed. Rules

Serv. 2d 355 (M.D.N.C. 1976)(Title VII class action in which both injunctive relief and money damages were sought; the Court ordered notice of type similar to that required by (b)(3)); *Ostapowicz v. Johnson Bronze Co.*, 54 F.R.D. 465, 466 (W.D. Pa. 1972)(court "has discretionary power to require notice under Rule 23(a) and in our discretion we do require that such notice be given so that requirements of due process be satisfied and all members . . . be given an opportunity to join or opt out.")

B. The Text and Background of Rule 23(b) Support the Extention of Opt-Out Rights to Members of Rule 23(b)(2) Classes Seeking Monetary Damages.

These decisions reflect a principled recognition that fundamental fairness demands that the opportunity to opt out be afforded to members of a plaintiff class whose individual interests in preserving a measure of autonomy closely resemble those of Rule 23(b)(3) class members. Generally speaking, those interests are most similar where the members of a Rule 23(b)(2) class primarily seek monetary damages, as distinguished from injunctive relief.

The distinction between strictly equitable relief and relief requiring individualized treatment finds support in the Supreme Court's language in *Eisen* and *Sosna v. Iowa*, 419 U.S. 393 (1975) which explicitly equates actions for equitable relief with subsection (b)(2) and actions for monetary relief with subsection (b)(3). *Id.* at 432, *citing Eisen, supra*, 417 U.S. at 177 n.14; *Sosna, supra*, 419 U.S. at 397.[1]

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[1] It is important to note that while *Eisen* applies only to the mandatory notice provisions for Rule 23(b)(3) actions, the Court in *Sosna v. Iowa*, 419 U.S. 393 (1975), explained that the notice problems in *Eisen* were not implicated when a 23(b)(2) class action was involved:

Professor Moore fully endorses this view and goes even further:

> Subdivision (b)(2) is limited to actions where injunctive or declaratory relief on behalf of the class is the exclusive or predominant final result sought. Thus a request for such a remedy merely in aid of a suit for money damages, to preserve the status quo, for instance, would not bring the action within (b)(2). Similarly, where it is clear that the real aim of the litigation is the ultimate money award, with a plea for injunctive relief appended as a formality or a very secondary consideration the action should be classed within (b)(3). If, however, injunctive relief and damages would be equally appropriate remedies, and both may be obtained, the court should divide the suit into subclasses handled under the separate subdivisions of (b); in many such situations class action may only be necessary for the injunctive aspect, with those individuals suffering actual injury pressing their individual claims for damages in a separate count.

3B *Moore's Federal Practice* par. 23.45, at 23-296 to 23-297 (2d ed. 1993). Professors Wright and Miller are also in accord. C. Wright and A. Miller, *Federal Practice and Procedure* §1775, at 21.

> Although the complaint did not so specify, the absence of a claim for monetary relief and the nature of the claim asserted disclose that a Rule 23(b)(2) class action was contemplated. Therefore, the problems associated with a Rule 23(b)(3) class action, which were considered last Term in *Eisen* . . ., are not present in this case.

Id. at 397 n.4 (citation omitted).

Subsection 23(b)(2), by its terms, clearly envisions a class defined by the homogeneity and cohesion of its members' grievances, rights, and interests. Rosen, *Title VII Classes and Due Process: To (b)(2) or Not to (b)(3)*, 26 Wayne L. Rev. 919, 923 (1980). The import of the language of (b)(2) is that the claims contemplated by that section are class claims, claims resting on the same grounds and applying more or less equally to all members of the class. Because the interests of the (b)(2) plaintiffs are substantially cohesive, it makes it likely that representative members can adequately represent the interests of absent members, conflicts will be minimal, and there will be little need for an interest in individual representation. Members who are not notified or given an opportunity to exclude themselves from the class before their rights are adjudicated are not deprived of due process since their claims rest on precisely the same grounds as the other members' claims, and all the issues they could have raised were, in fact, adjudicated in the context of the class. Too, their relief, if any, was also intended to be identical: *e.g.* a halt to the alleged wrongful actions or policies. *Id.* at 925. As the Fifth Circuit noted, opting out of a 23(b)(2) suit seeking only injunctive relief would have little practical value or effect. Even class members who opted out could not avoid the effects of a judgment---a 23(b)(2) injunction would enjoin all illegal action, and all class members would necessarily be affected by such broad relief. *Johnson*, 598 F.2d at 437-38. *See* Note, *Statutes of Limitation and Opting Out of Class Actions*, 81 Mich L. Rev. 399, 401 n.8 (1983). Under such circumstances, one commentator has posited, the contribution that individual notice and the right to opt out can make to buttressing adequate representation is not great enough to warrant a mandatory procedural or constitutional requirement. Note, *Notice in Rule 23(b)(2) Class Actions for Monetary Relief: Johnson v. General Motors Corp.*, 128 U. Pa. L. Rev. 1236, 1252 (1980).

The distinctions between (b)(2) and (b)(3) class actions led the Advisory Committee to conclude that binding all members of a (b)(3) class was not as fair as binding all members of a (b)(2) class. *Wetzel v. Liberty Mut'l Insur. Co.*, 508 F.2d 239, 249 (3d Cir. 1975). The requirement of homogeneity of rights and interests among 23(b)(2) class members is reinforced by the Advisory Committee's Note to the Federal Rules of Civil Procedure 1966 Amendments, which states that the (b)(2) subdivision was not intended to "extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23(b)(2), Advisory Committee's Note 241 (1975).[2] By the very nature of a heterogeneous (b)(3) class, there would be many instances where a particular individual would not want to be included as a member of the class. To respect these individual interests, Rule 23 (c)(2) was written to afford an opportunity to every potential member to opt out of the class. Advisory Committee's Note to Proposed Amendments to Rule 23, 39 F.R.D. 69, 104-05 (1966).

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[2] The Committee Notes emphasize:

> The subdivision is intended to reach situations where . . . final relief of an injunctive or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate . . . The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.

Advisory Committee's Note 241 (1975) (emphasis added).

CONCLUSION

For these reasons, Amicus urges this Court to affirm the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1993

TICOR TITLE INSURANCE COMPANY, ET AL.,

Petitioners,

v.

WALTER THOMAS BROWN AND JEFFREY L. DZIEWIT,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF JAMES MENENDEZ, MARVEL STRAUB AND HERMAN MYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

Amici James Menendez, Marvel Straub, and Herman Myers are Illinois residents and absent class members in a nationwide "limited fund" class action pending in federal court in Tyler, Texas. *Ahern v. Fibreboard Corp.*, Civil Action No. 6:93cv526 (E.D.Tex., filed Sept. 9, 1993). The defendant in the class action, Fibreboard, with its insurers, orchestrated the filing and simultaneous settlement of the action in order to force resolution of all claims for asbestos-related personal injuries in the single forum in Texas. Amici each have personal injury claims against Fibreboard and other manufacturers which they wish to pursue separately in the Illinois courts; they do not approve of the terms of the proposed class action settlement and do not wish to litigate their claims or objections in the distant federal forum. But because the *Ahern* action was brought as a mandatory class action under Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure, neither amici nor any other absent class members will be permitted to exclude themselves from the class.

Two of the settling parties in the *Ahern* case, Pacific Indemnity Company and Continental Casualty Company, joined by the American Insurance Association, have filed an amicus curiae brief urging the Court to tailor its decision in the case at bar to preserve the ability of the federal courts to resolve individual claims for personal injury damages through mandatory "limited fund" class actions.

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[1] Pursuant to Rule 37 of the Rules of this Court, amici have obtained the consent of petitioners and respondents to file this brief. The parties' letters of consent have been filed with the Clerk of the Court.

In their brief, these insurance companies seek this Court's approval of the "limited fund" class action procedure on policy grounds, touting the alleged efficiency of such actions while urging the Court to accord little or no weight to the right of victims of tortiously-inflicted injuries to individual determination of their damage claims in a convenient forum.

Amici's purpose in submitting this amicus curiae brief is two-fold.[2] First, amici ask the Court to approve the Ninth Circuit's holding, based on this Court's unequivocal language in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), that a class action cannot adjudicate the claims for money damages of persons who have no minimum contacts with the forum state, without providing such persons with a right to exclude themselves from the action. Second, although the issue should not be addressed at all in this case because it is not implicated on these facts and has not been raised by the parties, amici write to refute the insurance industry's suggestion that "limited fund" class actions that deny absent class members the right to exclude themselves from the class

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[2] At the outset, however, amici respectfully suggest that the Court should not decide this case at all, because the dispute between the petitioners and respondents has been settled, as the parties informed the Court in their joint letter of October 1, 1993. Even if the case is not technically moot due to the necessity of district court approval of the settlement, the lack of sufficient adversity of interest among the parties, and the far-reaching implications of the constitutional questions raised in the case, strongly counsels this Court to use its discretion to dismiss the writ as improvidently granted.

provide a practical, constitutionally permissible way to resolve mass tort cases.

SUMMARY OF ARGUMENT

Phillips Petroleum Co. v. Shutts should be interpreted to support the Ninth Circuit's holding that, absent consent, neither state nor federal courts may exercise personal jurisdiction over litigants who lack minimum contacts with the state in which the court sits. The extent of due process protections afforded litigants should not depend on whether a claim has been filed in a state court, or at the federal courthouse across the street. The concept of "fair play and substantial justice" imbedded in the Due Process clause of the Fourteenth Amendment, which limits the exercise of personal jurisdiction by state courts, also guides Fifth Amendment limitations on the exercise of federal court jurisdiction. While minimum contacts with state territorial boundaries may not in every case fully address concerns implicated by "fair play and substantial justice," state boundaries provide reasonably bright lines by which to determine whether a court has exceeded its constitutionally authorized jurisdiction. Alternatively, if state territorial boundaries do not limit the exercise of federal court jurisdiction, federal courts must apply some balancing test to ensure that litigants are not unfairly treated by having their rights adjudicated in a distant forum. Moreover, amici point out in Part I(B) that, although the present case involves claims brought under a federal statute, when considering limits on the exercise of federal court jurisdiction over absent class

members with state law claims within the diversity jurisdiction of federal courts, this Court must consider constitutional federalism concerns. Even if the Fifth Amendment allows a federal court to exercise personal jurisdiction over plaintiffs with federal claims who lack minimum contacts, federal courts owe a constitutional obligation of comity to the states which limits their jurisdictional authority to bind class members with state law claims to the bounds of state court jurisdiction.

In response to the amicus brief of the American Insurance Association, et al., amici note in Part II that the "limited fund" class action device should never be used to resolve mass tort litigation. Rule 23(b)(1)(B) was not intended to apply to situations involving a defendant facing potential insolvency from *in personam* liabilities arising out of a mass tort. The types of "limited fund" which justify certification under this provision consist of identifiable, finite assets in which all class members have a preexisting interest. Furthermore, application of Rule 23(b)(1)(B) to mass tort cases would violate the Constitution's overriding principles of separation of powers and federalism, as well as the Rules Enabling Act, by abridging the substantive rights of mass tort victims. Absent statutory authorization, federal courts are not constitutionally empowered to modify substantive rights by distributing only *some* of a defendant's assets on a pro rata basis to tort creditors, whose judgments entitle them to reach *all* of the defendant's assets. Finally, adjustment of the rights of mass tort victims via the class action device, while leaving intact the rights of the defendant's other creditors, denies those victims equal protection of the laws as guaranteed under the Fifth Amendment.

ARGUMENT

I. ABSENT CONSENT, A FEDERAL COURT MAY NOT EXERCISE PERSONAL JURISDICTION OVER CLASS MEMBERS WHO LACK MINIMUM CONTACTS WITH THE STATE IN WHICH THE COURT SITS.

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), this Court established that a court wishing "to bind an absent plaintiff concerning a claim for money damages or similar relief at law . . . must provide minimal procedural due process protection." 472 U.S. at 810. Such minimal protection must include "notice plus an opportunity to be heard and participate in the litigation, whether in person or though counsel . . . [and] an opportunity [for the absent plaintiff] to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Id.*

The due process right of absent class members to exclude themselves from actions involving money damages recognized by the Court in *Shutts* is based on two related interests of absent class members: their interest in controlling their inherently particularized claims for damages, and their interest in avoiding the involuntary adjudication of their damages claims by a distant forum. Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 52-57 (1986). The role of opt out rights in protecting the due process interest of individuals in controlling their own damages claims is set out in the *amicus curiae* briefs in support of respondents filed by Trial Lawyers for Public Justice and Public Citizen. In this brief, amici Menendez, Straub and Meyers explain

that the interest of absent class members in avoiding involuntary adjudication of their damages claims by a distant forum similarly requires protection by recognition of the right to opt out.

A. The Due Process Clauses of Both the Fifth and Fourteenth Amendments Protect Individuals' Interest in "Fair Play and Substantial Justice," Which Do Not Change as a Result of the Court in Which the Lawsuit Is Pending.

In *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), this Court established that due process restrains state courts from exercising jurisdiction over defendants in a manner that would "offend traditional notions of fair play and substantial justice." Thus, the relationship between the forum and the litigant whose rights are being affected without consent must be such that an adjudication in that forum would be reasonable. 326 U.S. at 317. This Court has consistently reiterated this principle in defining the due process limits of state court jurisdiction. *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinea*, 456 U.S. 694, 702-03 (1982); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985).

If deciding a litigant's rights in a distant state court would offend notions of "fair play and substantial justice," so would adjudication of those rights in a federal court sitting in the same distant state. Due process limits on personal jurisdiction are intended to protect parties

against "the burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen*, 444 U.S. at 292. Such burdens are identical in cases brought in the same locality, whether those cases are pending in state or federal courts. *See GRM v. Equine Investment and Management Group*, 596 F.Supp. 307, 314 (S.D. Tex. 1984) (noting that notions of "fair play and substantial justice" are the same under the Due Process Clauses of both the Fifth and Fourteenth Amendments). As two commentators have written following *Shutts*:

> it seems difficult to justify due process differences affecting notice and opt-out protection provided by *Shutts* when the alternative is to bind nonconsenting litigants by adjudication in forums with which they have no affiliation. The disadvantages of distant forum abuse are not mitigated by the forum's federal rather than state character.

Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 30-31 (1986). Lower federal courts have consistently applied the jurisdictional aspect of the *Shutts* holding to class actions brought in federal courts. *See Carlough v. Amchem Products, Inc.*, No. 93-1482, 1993 WL 492511, at *7 (3d Cir. Dec. 1, 1993) (noting that absent plaintiffs who lack minimum contacts with Pennsylvania must be allowed the right to opt out of a federal class action brought in the Eastern District of Pennsylvania); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992) ("*Shutts* mandates that a plaintiff be permitted to opt out of a proposed class when the court does not have personal jurisdiction over the plaintiff"); *In re Real Estate Title & Settlement Services Antitrust*

Litigation, 869 F.2d 760, 766 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989) ("*Shutts* stands for the proposition that a court can bind all members of a plaintiff 'opt out' class to a judgment for damages even if the class members do not meet the traditional requirements of *in personam* jurisdiction"); *Waldron v. Raymark Indus., Inc.*, 124 F.R.D. 235, 238 (N.D.Ga. 1989) (holding that the *Shutts* language "would be equally applicable to federal courts seeking to exercise personal jurisdiction over plaintiffs with insufficient minimum contacts with the forum to support personal jurisdiction"). The minimum contacts test provides a reasonable easily applied bright line understood by both state and federal courts.[3] Even if this Court rejects minimum contacts with state boundaries as setting the appropriate constitutional limit on the exercise of federal court jurisdiction, due process nonetheless mandates that a party's interest in "fair play and substantial justice" be protected:

> If due process is to have any application at all in federal cases – and the Fifth Amendment requires that it does – it seems impossible that Congress could empower a plaintiff to force a defendant to litigate any claim . . . in whatever forum the plaintiff chooses, regardless of the burden on the defendant.

4 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE & PROCEDURE § 1067.1 at 328-29

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[3] Because Federal Rule of Civil Procedure 4(e) limits the exercise of jurisdiction of federal courts to the jurisdictional reach of the state court in which it sits, federal courts regularly conduct minimum contacts analysis under state long-arm statutes.

(1982). It seems equally impossible that due process would allow a federal court to exercise jurisdiction over an absent class member against that person's wish, no matter how far the federal court is from the absent plaintiff's residence. Thus, this Court should alternatively adopt an *ad hoc*, fairness approach to the exercise of federal court jurisdiction, which would allow a federal district court to assert personal jurisdiction over an unwilling litigant only when fair under the circumstances. *See Handley v. Indiana & Mich. Elec. Co.*, 732 F.2d 1265 (6th Cir. 1984); *Horne v. Adolph Coors Co.*, 684 F.2d 255 (3d Cir. 1982); *Kinsey v. Nestor Exploration Ltd.*, 604 F.Supp. 1365, 1373 (D.C. Wash. 1985).

B. Federalism Constraints Implicit in the Fifth Amendment Demand That Federal Courts Sitting in Diversity Not Assert Jurisdiction over Distant Plaintiffs.

Finally, amici must point out that, whatever decision the Court makes with respect to the exercise of personal jurisdiction in this case, state law claims brought under the diversity jurisdiction of the federal courts implicate separate federalism concerns militating against the exercise of federal court jurisdiction over absent plaintiffs who lack minimum contacts with the state in which the court sits. When sitting in diversity, federal courts are bound by the constraints of state law, and the entire lawsuit implicates only local interests. Although there are unquestionably national interests in the enforcement of federal antitrust or securities laws, Congress has not seen fit to create substantive tort laws supplanting those developed by the states. Enforcement of those laws is

thus a paramount *state* interest, and it should, absent the consent of the litigants, take place in a local forum in which the litigants reside. Application of the minimum contacts test in the context of the exercise of federal court jurisdiction over absent class members with state law claims is therefore mandated by both the state sovereignty concerns and personal liberty guarantees embraced in the Constitution. *See World-Wide Volkswagen*, 444 U.S at 293 (the constitutional limits of a court's jurisdictional power must "remain faithful to the principles of interstate federalism embodied in the Constitution").

II. LIMITED FUND CLASS ACTIONS MAY NOT APPROPRIATELY BE USED TO RESOLVE MASS TORT LITIGATION

The concerns of amici addressed in the discussion below are related to the propriety of using the "limited fund" class action as a device to resolve mass tort cases, which is an issue that is unquestionably *not* presented in this case. There has never been any allegation of a limited fund by any of the parties in this case or in the earlier class proceeding in MDL 633, and thus both Petitioners and Respondents have wisely chosen not to brief the issue of whether the Ninth Circuit's holding should extend to such actions.[4]

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[4] Petitioners do, however, acknowledge in their brief that "Rule 23 currently does not permit mandatory class actions" in "mass tort cases in areas like asbestos." Brief for Petitioners at 27.

Amici include this discussion of limited fund classes solely to respond to the amicus brief filed by the American Insurance Association, et al. in support of Petitioners, which argues extensively regarding this inapposite issue. Amici strongly urge the Court not to address the issue at all here, without briefing and argument by the parties, given both the complexity of the constitutional and statutory questions implicated and the political controversy surrounding resolution of mass tort cases. However, to ensure that the Court receives a balanced view of the subject, amici briefly explain below why limited fund class actions should not and cannot, within the bounds of the Constitution, be used to extinguish the rights of mass tort victims.

In a transparent effort to secure judicial legislation redefining the rights of mass tort victims, defendants have recently embraced "limited fund" class settlements as "a more equitable means" to resolve mass tort cases. Brief for the American Insurance Association, Continental Casualty Company and Pacific Indemnity Company as *Amici Curiae* in Support of Petitioners (hereinafter "AIA Brief"), at 7-8. Although such actions involve no identifiable res which a court can allocate to claimants on a pro rate basis, by "settling" the action the defendant creates such a fund, which acts to cap the total aggregate recovery for victims of a particular mass tort. This manipulation of Rule 23 is designed to alter the substantive rights of mass tort victims while leaving intact the defendant and its other creditors. Such an abuse is absolutely at odds with both the rule itself and our federal Constitution.

A. Rule 23(b)(1)(B) Does Not Apply to Cases Involving the Potential Insolvency of a Defendant as a Result of Tort Litigation.

Federal Rule of Civil Procedure 23(b)(1)(B) provides that an action may be maintained as a class action if the prerequisites of subdivision 23(a) are satisfied and:

> the prosecution of separate actions by or against individual members of the class would create a risk of . . . adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Fed.R.Civ.P. 23(b)(1)(B). This provision was primarily intended to allow for class adjudication of multiple claims against a "limited fund." *See Rules Advisory Committee Notes to 1966 Amendments to Rule 23*, 39 F.R.D. 69, 101 (1966) (noting the appropriate use of classes certified under this subsection "when claims are made by numerous persons against a fund insufficient to satisfy all claims"). A limited fund is "a fixed asset or piece of property . . . in which all class members have a preexisting interest. . . . Classic illustrations include claimants to trust assets, a bank account, [life] insurance proceeds, company assets in a liquidation sale, [and] proceeds of a ship sale in a maritime accident suit." 1 Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS § 4.09 at 4-32-33 (3d ed. 1992).

The potential insolvency of a defendant due to lawsuits arising out of a mass tort does not create a "limited fund" sufficient to certify a class under Rule 23(b)(1)(B).

In the mass tort situation, the defendant has unlimited *in personam* liability for the injuries alleged, rather than having its liability limited by the amount of a particular identifiable res that can be tendered to the court, such as a trust fund, bank account, or life insurance proceeds. Rule 23(b)(1)(B) was designed to allow a court to distribute a limited amount of money among eligible claimants on a pro rata basis, but such a distribution is impossible without a specific, identifiable fund. Unlike judgments from claims against a bank account or trust fund, a judgment in a tort claim entitles the victim to reach *any* of the defendant's assets. Rule 23 does not empower federal courts to reduce *in personam* judgments on a pro rata basis by setting some arbitrary limit on the percentage of the defendant's assets that should be available to victims of a particular mass tort. Under the Constitution, such an alteration of substantive rights is exclusively within the power of Congress, which has allowed for pro rata distribution of a defendant's assets only in very particular circumstances when accompanied by a plethora of procedural safeguards, which are set out in the United States Bankruptcy Code. Rule 23(b)(1)(B) was never intended as a substitute for bankruptcy, and the use of limited fund class actions in mass tort cases by the judiciary impermissibly invades the constitutional authority of Congress.

B. Article III Courts May Not Constitutionally Adjust the Substantive Rights of Tort Victims Merely Because a Defendant May Lack Sufficient Assets To Pay the Claims Asserted Against It.

In upholding the diffusion of responsibilities mandated by the Constitution's separation of the powers of

government, this Court "consistently [has] emphasized that the federal lawmaking power is vested in the legislative, not the judicial, branch of government." *Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 95 (1981). In the context of state law tort actions brought in federal court, the judiciary's function is further limited by federalist principles of comity to state lawmaking authorities. Congress embraced these dual constitutional principles in passing the Rules Enabling Act, 28 U.S.C. § 2072, which prohibits this Court from enacting rules of procedure which "abridge, enlarge or modify any substantive right." As Professors Wright, Miller, and Cooper explain in discussing this provision:

> The mere fact . . . that Congress has the constitutional power to formulate substantive law in areas of federal concern does not in itself give the federal judiciary an equal power, and certainly no such judicial power could reasonably be inferred from the grant of authority to the Supreme Court to prescribe general rules of practice and procedure. When matters of state substantive law are at issue, principles of federalism – which command that substantial deference be given to the ways in which the states have seen fit to structure social relationships in areas of state competence – are also implicated.

19 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4509 at 140 (1982).

Application of Rule 23(b)(1)(B) to mass tort cases violates constitutional separation of powers and federalism principles, as well as the Rules Enabling Act, by

abridging the substantive state law rights of tort claimants. *See Piambino v. Bailey*, 610 F.2d 1306, 1331 (5th Cir. 1980) (Rule 23 is merely a procedural rule and does not create any rights or remedies). The only arguably possible source of a "limited fund" which might allow for certification of a (b)(1)(B) class in the mass tort context is the potential insolvency of the defendant. If under Rule 23 the risk of insolvency in fact permits certification of a limited fund class, the relevant fund would have to consist of *all* of the assets of the potentially insolvent defendant, which the court would theoretically distribute pro rata among class members if the eventual class judgment exceeded the worth of those assets. The claimants would thus be awarded less than what their claims entitled them under the relevant substantive tort law.

The separation of powers problem in this context is underscored by the existence of the Bankruptcy Code, a comprehensive remedial scheme enacted by Congress to deal with exactly the type of problem which the AIA Brief contends should be solved via Rule 23(b)(1)(B). When Congress has articulated the law governing the resolution of a particular question, a court must apply the federal statute that controls the issue and may not fashion some other law to resolve the controversy. *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988); *Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 95-96 n.34 (1981). If a party's debts, including judgments against it, exceed its assets, then either the debtor or its creditors may seek to alter the substantive rights of the creditors under the provisions of the Bankruptcy Code, which provides debtors a "fresh start," *Grogan v. Garner*, 498 U.S. 279, 286 (1991), while also providing significant

protections for creditors. Article III courts have no authority to undertake the same alteration of substantive rights absent statutory authorization. In a very recent decision reversing a limited fund class certification based on the potential insolvency of an asbestos defendant, the Second Circuit emphasized that such an adjustment of creditors' rights is not the appropriate role of the judiciary, whether or not the class action might be "more efficient" than bankruptcy: "the function of the federal courts is not to conduct trials over whether a statutory scheme should be ignored because a more efficient mechanism can be fashioned by judges." *Keene Corp. v. Fiorelli*, No. 93-7712, 1993 WL 497538, at *6 (2d Cir. Dec. 1, 1993) (motion for rehearing and suggestion for rehearing en banc pending).

Certification of a limited fund class action on the basis of the defendant's possible insolvency not only exceeds the authority of the federal courts under Article III, but in the process also denies creditors the significant safeguards provided by Congress in the Bankruptcy Code. As the *Keene* court noted:

> [C]lass members in cases such as this would have no say in the conduct of the court-appointed class representatives, and unlike creditors in bankruptcy, are not able to vote on a settlement. *See* 11 U.S.C. § 1126. For them, it would be "cram-down" from start to finish. Finally, unlike a lawyer for a creditors' committee, the class representatives in matters like the present one may not be compensated unless a settlement is reached, a situation fraught with danger to the rights of plaintiffs.

Keene, 1993 WL 497538, at *6; *see also In re Joint Eastern & Southern District Asbestos Litig.*, 982 F.2d 721, 736 (2d Cir. 1992) (the differences between protections afforded under Rule 23 and the Bankruptcy Code "raise a substantial question whether a class action may be used to adjust claims against an insolvent entity").

Finally, use of Rule 23 to modify the rights of mass tort victims outside of bankruptcy denies them equal protection of the law by limiting the asset base from which those victims may recover without affecting the substantive rights of the defendant's other creditors. The Fifth Amendment contains an equal protection component that limits discrimination by the federal government just as the Fourteenth Amendment's Equal Protection Clause limits discrimination by the states. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 542 n.21 (1987). Any application of Rule 23 that treats mass tort victims differently from other creditors is not rationally related to any legitimate governmental interest and therefore violates the equal protection component of the Fifth Amendment.

The *Ahern* class action that AIA urges this Court to preserve, like the class action rejected by the Second Circuit in *Keene* just two weeks ago, "is a self-evident evasion of the exclusive legal system established by Congress for debtors to seek relief." *Keene*, 1993 WL 497538 at *5. Contrary to the assertions of the AIA, use of the "limited fund" class action to resolve mass tort litigation is not cognizable under Rule 23 and would additionally violate constitutional principles of federalism and separation of powers. In deciding this case, the Court should

give no credence to the arguments of the insurance industry that Rule 23(b)(1)(B) provides a viable method of achieving global resolution of mass tort cases.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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December 14, 1993

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In The
Supreme Court of the United States
October Term, 1992

No. 92-1988

Ticor Title Insurance Company, *et al.*,

Petitioners,

v.

Walter Thomas Brown and Jeffrey L. Dziewit,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

INTEREST OF PUBLIC CITIZEN

This case raises the issue of whether absent members of a plaintiff class have an absolute right to opt out of a class action involving substantial damage claims. This brief is filed, with the written consent of the parties, on behalf of Public Citizen, a non-profit public interest organization with over 165,000 members.

Public Citizen, through the attorneys in its Litigation Group, has represented named plaintiffs and absent class members in class actions for money damages, in which it has

consistently supported the right to opt out. As a result of its work in this area, Public Citizen is committed to ensuring that the class action procedure is employed to aid the resolution of cases involving large numbers of similar claims without depriving absent class members of their rights under Rule 23 of the Federal Rules of Civil Procedure and their constitutional right to due process. Public Citizen does support the use of the mandatory class action device -- one in which absent class members may not opt out -- as a means of completely resolving the various competing claims of all parties and non-parties, but only in certain types of cases. This is not such a case, and to permit a mandatory class here would foreclose viable and substantial damage claims without adequate justification.

Public Citizen submits this brief for two reasons: (1) to offer a non-constitutional ground for deciding that respondents were denied their opt out right in this case, i.e., that the class should have been certified only under Rule 23(b)(3) of the Federal Rules, which provides for the same right to opt out that due process requires; and (2) to present our somewhat different analysis of the due process issue than respondents may offer. Public Citizen has long advocated the use of the three-part test in *Mathews v. Eldridge*, 424 U.S. 319 (1976) -- a case not previously relied on by this Court in this context -- and believes that it is applicable to the due process issues presented in this case. While petitioners also urge the use of *Mathews* with respect to the opt out issue, they take a rather different view of its applicability to this case than is presented in this brief.

STATEMENT OF THE CASE

In 1986, petitioners, six title insurance companies, obtained judicial approval to settle twelve separate class actions in which they were defendants. Those actions, which were filed after the Federal Trade Commission (FTC) initiated an enforcement action against petitioners, had been

consolidated as MDL 633 in the Eastern District of Pennsylvania. *In re Real Estate Title and Settlement Services Antitrust Litigation*, 1986-1 Trade Cas. (CCH) ¶67,149 (E.D.Pa. 1986)(Pet. App. 31a - 77a). Petitioners argue that the MDL 633 judgment precludes respondents from litigating their claims for substantial money damages in the current action, which was later filed in the United States District Court for the District of Arizona.

The complaints of the MDL 633 plaintiffs principally sought treble damages for injuries sustained by consumers in thirteen states, including Arizona and Wisconsin, as a result of unlawful price fixing of title services by petitioners. None of the original twelve actions that comprised MDL 633 was filed by a resident of Arizona or Wisconsin, and none of the named plaintiffs was alleged to have been injured by petitioners' activities in those states. All of the complaints were class actions, and all sought certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure.

During the pendency of the MDL proceedings, this Court decided *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48 (1985), involving the state action defense to antitrust liability, which lowered the expectations of the named plaintiffs' attorneys in MDL 633 about their cases. Pet. App. 33a. Pricing of title services is governed by state law and the state action defense to antitrust liability hinges on the manner in which a state regulates the industry. *Southern Motor Carriers* helped petitioners because it expanded the state action defense to situations where collective rate making conduct was merely permitted, but not mandated, by state law. As a result, the defense protects petitioners in cases where (1) the state has clearly articulated and affirmatively expressed a policy permitting collective rate making, and (2) the state actively supervises the rating activity. *Id.* at 57.

The attorneys representing the MDL 633 plaintiffs recognized that each of the thirteen affected states had

statutes that permitted collective ratemaking. Pet. App. 34a. Therefore, the viability of the defense depended on whether each of the states actively supervised petitioners' ratemaking activities, which could only be determined by an individual assessment of each state's regulatory program. *See, e.g., Federal Trade Comm'n v. Ticor Title Ins. Co.*, 112 S. Ct. 2169 (1992). Seeing their own claims as uncertain, the plaintiffs' attorneys commenced settlement discussions with the six defendants. Pet. App. 36a. Before the MDL 633 court determined whether any of the states actively supervised the defendants' ratemaking activities, the parties reached a proposed settlement. Pet. App. 37a.[1]

The MDL 633 settlement purported to foreclose the damage claims of all members of the class in every state against all the petitioners. In exchange, the settlement offered all class members a slight coverage increase for each title insurance policy issued from 1981 to 1985 or, for class members who did not hold their own policies during that period, a one-year window of opportunity to purchase a new policy with slightly higher coverage than usually received for

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[1]Notwithstanding this Court's decision in *Southern Motor Carriers*, the FTC continued its enforcement proceeding against petitioners for alleged violations in Arizona, Wisconsin, and four additional states, although it dropped its claims relating to collective ratemaking in seven other states based on the state action defense. The FTC eventually concluded that the state action defense did not shield petitioners' activities in Wisconsin and Arizona. *In re Ticor Title Ins. Co.*, Docket No. 9190, FTC Final Order (September 19, 1989). The Third Circuit reversed on the grounds of state action immunity, *Ticor Title Ins. Co. v. Federal Trade Comm'n*, 922 F.2d 1122 (3d Cir. 1991), and this Court reversed the judgment of the Third Circuit, remanding the case for further proceedings consistent with the conclusion that petitioners were not entitled to state action immunity in Wisconsin and might not be entitled to such immunity in Arizona. *Federal Trade Comm'n v. Ticor Title Ins. Co.*, 112 S. Ct. at 2179.

the price of the policy. Pet. App. 38a. The MDL 633 court recognized that these so-called "enhancement" provisions did not provide any direct benefit to class members and that some members of the class might not benefit at all from these provisions. Pet. App. 65a-67a. However, the court saw some benefit to class members in the additional shifting of the risk of failure of title. Pet. App. 65a-66a.

The settlement did not affirmatively require any specific restructuring of the title insurance industry. Instead, it merely included an 18-month injunction against rating bureau activity in six states -- Arizona, Wisconsin, and the four other states that were still part of the FTC's action against the title insurers. Although petitioners had previously withdrawn from rating bureaus in these six states, and accordingly were not affected by the injunction, the MDL court explained that the companies were sacrificing their right to return to such practices, at least for 18 months. Pet. App. 70a. The injunction specifically allowed the continuation of collective ratemaking in the other seven states, as long as the activities would have been protected by the state action defense. Finally, the settlement provided for the payment of costs and $715,000 in attorneys' fees to class counsel.

The settlement was contingent upon the preclusion of every claim of every class member, large or small, arising out of allegations that petitioners conspired to affect the prices of title services from 1981 to 1985, and it did not permit any class member to opt out. Although the MDL 633 court recognized that one of the primary factual issues, the "quantum of active supervision of the rate-making process in each state . . . may vary somewhat in the different affected states," Pet. App. 44a, the court yielded to the parties' request that the class be certified as a mandatory class action pursuant to Rules 23(b)(1)(A) and 23(b)(2), and the court did not consider whether the class was properly certifiable under Rule 23(b)(3), as the plaintiffs had originally maintained in their complaints. Pet. App. 56a.

The Attorney General of Arizona attempted unsuccessfully to opt out of the settlement class, on behalf of the state and its citizens, and the Attorneys General of Wisconsin and four other states objected to the settlement. However, the MDL 633 court refused to permit anyone to opt out, Pet. App. 50a-51a, and it overruled all objections in approving the settlement in June 1986. The Third Circuit affirmed without opinion. *In re Real Estate Title and Settlement Services Antitrust Litigation*, 815 F.2d 695 (3d Cir. 1987), *cert. denied*, 485 U.S. 909 (1988)(Pet. App. 78a-79a).

In a related case, litigated prior to the current action, the Arizona Attorney General sued petitioners in Arizona state court on behalf of state school districts seeking damages under Arizona's state antitrust law. Petitioners sought, and the MDL 633 court entered, an order enjoining the prosecution of the Arizona state case on *res judicata* and substantive grounds. However, the Third Circuit vacated the injunction, recognizing that, because the MDL 633 class action sought both injunctive and damages relief, the settlement could be collaterally attacked by any absent class member who did not have minimum contacts with the MDL 633 forum and who had neither consented to jurisdiction nor received an opportunity to opt out. *In re Real Estate and Settlement Services Antitrust Litigation*, 869 F.2d 760, 769 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989).

Thereafter, respondents, who are residents of Arizona and Wisconsin, filed the present antitrust action in the United States District Court for the District of Arizona on behalf of a class of Arizona and Wisconsin title insurance consumers. Like the complaints that were consolidated in MDL 633, the complaint here was filed under Rule 23(b)(3) and principally sought treble damages. J.A. 9-11. Petitioners moved for summary judgment, in part on the ground that respondents were members of the mandatory class in the MDL 633 settlement and, therefore, were bound by the doctrine of *res judicata*. The district court refused to allow respondents to

pursue their claims for substantial damages on the ground that the previous settlement had extinguished all damage claims of the members of the class certified in MDL 633. Pet. App. 17a - 30a.

The Ninth Circuit reversed, holding that minimal due process would be violated if respondents' damage claims were barred by *res judicata*. Recognizing that *res judicata* cannot bar an absent plaintiff from litigating a claim if the plaintiff was not adequately represented or was denied due process, the court explained that "'minimal due process requires that an absent plaintiff be provided with an opportunity to remove himself from the class,' . . . if monetary claims are involved." Pet. App. 12a (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)). Because no such right was provided in the MDL 633 litigation, the Ninth Circuit held that respondents could litigate their damage claims in this action.

SUMMARY OF ARGUMENT

I. While, in this Court, this case has focussed primarily on whether the prior action deprived respondents of their antitrust claims in violation of the Due Process Clause, this Court has consistently refused to decide a constitutional question if there is some other ground upon which to dispose of the case. That principle is fully applicable here; this Court need not reach the constitutional issues presented because, under the plain terms of Rule 23, respondents' substantial damage claims made the class in the MDL 633 action certifiable only as an opt out class under Rule 23(b)(3), and not as a mandatory class under Rules 23(b)(1)(A) or 23(b)(2).

The class action device is a limited exception to the traditional rule that a person must be a party in order to be bound by a prior judgment. *Hansberry v. Lee*, 311 U.S. 32, 41 (1940). This Court has historically held that a mandatory class action is only appropriate where the class

representatives hold a true common interest in the litigation. A judgment in a class action where this obligatory due process protection is not provided may be collaterally attacked and has no binding effect on absent class members. *Cf. Martin v. Wilks*, 490 U.S. 755 (1989).

Rule 23(b)(3) remains most faithful to the traditional rule that a person must be a party in order to be bound by a judgment in an action, and it must be utilized unless one of the other parts of Rule 23 clearly applies. By guaranteeing opt out rights, certification under subdivision (b)(3) seeks to take advantage of the efficiency of the class action procedure while ensuring that absent class members are only bound if they "consent" to appear by declining to opt out.

The other two certification provisions of Rule 23 stray farther from the traditional rule governing the binding effect of a judgment and are, therefore, limited to a narrow category of cases resting on specific equitable and practical circumstances, none of which is present here. Rule 23(b)(2) certification is only authorized when the relief sought is predominately injunctive and is essential to govern the defendants' future conduct towards the entire plaintiff class. Thus, for example, in a civil rights case involving complaints about a seniority system, the injunctive ruling must apply to everyone if there is to be a rule at all, and so there can be no opt outs from the injunctive aspect of the case. The MDL 633 case clearly was not appropriate for (b)(2) certification because it was primarily a case for money damages, as the complaints in the MDL 633 action, the current action, and the MDL 633 judgment, especially its purported preclusive effect, make clear. *See* J.A. 3, ¶ 1; Pet. App. 49a. Moreover, the injunctive relief was, for the most part, little more than a recasting of damage claims as an injunction where there was no practical need for a single outcome.

Similarly, certification under Rule 23(b)(1)(A) is only appropriate where the interests of the members of the class are inextricably intertwined, and separate actions create a

risk of inconsistent or incompatible judgments. Nothing in MDL 633 or this case creates that type of risk or requires the type of relief appropriate in (b)(1) cases.

Thus, because certification here was proper only under subdivision (b)(3), which entitled respondents to an opt out right which they were denied, respondents cannot be bound by the prior judgment.

II. Even if the MDL 633 class was properly certified, there has been a violation of due process because respondents have been denied the procedural protections to which they are entitled under the balancing test established by this Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). In this context, this test focusses on: (a) the property interest of the class members in their claims against petitioners, (b) the need for additional procedural protections to avoid the erroneous deprivation of that property interest, and (c) the governmental interests at stake if greater protection were afforded. In addition, because the burden of increased procedural protection here would primarily burden petitioners, not the government, that interest should also be considered. *Connecticut v. Doehr*, 111 S. Ct. 2105, 2112 (1991).

The balancing of the interests in this case demonstrates that the standards of due process have not been met. First, the private interests of the class members -- their antitrust treble damage claims -- measured at the outset of this litigation, were viewed as "substantial" by the Third and the Ninth Circuits. Second, the risk of erroneous deprivation of that interest was significant since the case turned on the difference between the state action defense in the states where the named representatives purchased title services, and those of class members from other states, including Arizona and Wisconsin, where the state action defense is inapplicable because of the nature of the state laws regulating title services. Third, the government interest in disposing of litigation efficiently through a single class action, such as

MDL 633, and in encouraging settlement, is counterbalanced by the interests of the federal and state courts in Arizona and Wisconsin in protecting the interests of the class members in those states. As for the interests of petitioners, they must assume responsibility for part of the burden of relitigation for not affording the absent class members their due process right to opt out. Moreover, petitioners still retain the benefit of settlement as to all the other MDL 633 class members. Therefore, since the balancing of all the factors is decidedly against the maintenance of a nationwide class, without the right to opt out, due process has not been satisfied.

ARGUMENT

I. THE MDL 633 COURT IMPROPERLY FAILED TO CERTIFY THE ACTION BEFORE IT UNDER RULE 23(b)(3).

Although petitioners have presented this case solely as a constitutional challenge -- thus sidestepping the question whether the MDL 633 court properly applied Rule 23(b) -- this Court has long held that it "should 'not decide a constitutional question if there is some other ground upon which to dispose of the case.'" *Lowe v. Securities and Exchange Comm'n*, 472 U.S. 181, 190 (1985)(declining to address constitutional issue on which certiorari was granted because case could be decided on statutory grounds not raised in petition)(citation omitted); *see also Califano v. Yamasaki*, 442 U.S. 682, 692-93 (1979). This Court recently reaffirmed that it has discretion to "decide[] a case on non constitutional grounds even though the petition for certiorari presented only a constitutional question." *Izumi Seimitsu Kogyo v. U.S. Philips Corp.*, No. 92-1123, 62 U.S.L.W. 4007, 4009 (U.S. Nov. 30, 1993); *accord Escambia County v. McMillan*, 466 U.S. 48, 51 (1984). As we now explain, because Rule 23 entitled respondents to opt out, this Court

need not decide whether due process also requires that result.[2]

Under ordinary principles of *res judicata*, a person is not bound by a judgment in a litigation in which she is not designated as a party or made a party by service of process. *Hansberry v. Lee*, 311 U.S. at 41; *Martin v. Wilks*, 490 U.S. at 761. We agree with petitioners (Br. 19) that the class action procedure is an exception to this basic rule. Thus, Rule 23 recognizes that, in certain circumstances, when it is more equitable and efficient to litigate a large number of claims in one action, all those who are properly members of the class can be bound by the outcome of the litigation, even if they are not formal parties to it. Nevertheless, this Court recognized over fifty years ago in *Hansberry v. Lee* that:

> It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation is either to assert a common right or to challenge an asserted obligation. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests . . . .

311 U.S. at 44-45 (citations omitted). Finding that it would violate due process to bind individuals to a judgment in an earlier litigation in which they did not participate, were not

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[2]The fact that the class was certified for settlement purposes is of no significance to the question of whether certification was proper under Rule 23(b)(1)(A) and (b)(2). While the settlement may make the case more manageable, it cannot completely override the strictures of Rule 23 and does not in any way obviate the due process objections raised here.

adequately represented, and did not share a joint interest with parties who were in fact present, this Court allowed the *Hansberry* petitioners to collaterally attack the prior judgment. As petitioners here recognize, an absent class member has a due process right to collaterally attack a judgment in a separate action "if his or her individual interest was not properly protected in the case." Pet. Br. 26. This right to collaterally attack a class action judgment "is integral to the constitutionality of the class action procedure." *In re Real Estate*, 869 F.2d at 769. Since petitioners do not dispute the right of respondents to attack the prior judgment on due process grounds, and since the due process questions can be avoided if this case can be decided based on the Federal Rules, there is no reason why respondents, who were deprived of the opt out benefits of Rule 23(b)(3), should not be allowed to attack the MDL 633 judgment since they did not actually litigate the issue in the prior case, nor did they otherwise consent to be bound by the MDL 633 judgment. *Id.* at 770-71.

Under the certification procedure of Rule 23, a proposed class must meet the numerosity, commonality, typicality, and adequacy of representation prerequisites of Rule 23(a). Thereafter, the Rule provides three subsections which determine who, other than the named plaintiffs, will be bound by the resolution of the suit, with subdivision (b)(3) providing substantially more protection to absent class members than (b)(1) or (b)(2).

Certification under (b)(3) is available in those cases seeking monetary relief where a class action would save time, effort, and money, and would promote uniformity. However, (b)(3) certification may not sacrifice procedural fairness. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1156 (11th Cir. 1983). Consequently, Rule 23(c)(2) requires that, in any class action maintained under subsection (b)(3), individual notice must be sent to all class members who can be identified with reasonable effort, advising them that they have the right to be excluded from the action, as well as to

intervene or otherwise participate in the litigation. Fed. R. Civ. P. 23(c)(2). Because of this notice and opportunity to opt out, absent class members "consent" to being bound by the suit unless they exercise their opt out rights. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Accordingly, subdivision (b)(3) remains most faithful to the traditional rule that a person must be a party in order to be bound by a judgment.

Rules 23(b)(1) and (b)(2) deviate far more than Rule 23(b)(3) from traditional principles governing the binding effect of judgments because they do not require that an absent plaintiff be granted the opportunity to opt out. The constitutional legitimacy of these mandatory class action provisions rests on the fact that they are only applicable when unique equitable concerns, none of which applied to the MDL 633 case, make a single outcome essential. While this Court has historically recognized that the mandatory class action device is permissible, that is only true where the class representatives hold a true joint interest in the litigation. *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302-03 (1854).[3]

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[3]Petitioners are correct that, "[w]here the parties are numerous, and . . . have or may have separate and distinct interests [and] . . . it is impractical to bring them all before the court," a decree in a class action may bind them. Br. 19. However, petitioners fail to note this Court's admonition that "though the rights of the several persons may be separate and distinct, yet there must be a common interest or a common right, which the bill seeks to establish or enforce." *Smith v. Swormstedt*, 57 U.S. (16 How.) at 302-03. Thus, in *Smith*, this Court allowed the class action device to be used to determine the rights of over 4500 persons to a church fund. This practice, a precursor to the certification procedure sanctioned by Rule 23(b)(1)(B), applies only where there is a so-called "limited fund," and there has been no suggestion that a limited fund analysis applies here.

In a (b)(2) suit, "the party opposing the class has acted or refused to act on grounds generally applicable to the class," and the class seeks "appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). The essence of the injury in such a case is a claim applying equally to all members of the class, and requiring compatible injunctive relief as a remedy. Thus, in a case challenging a seniority system or a pattern of discriminatory hiring, the employer must be subject to a single rule if there is to be any rule at all. Rule 23(b)(2) mandatory class actions involving monetary relief involve either (1) class claims for equitable injunctive and equitable monetary relief, *see Ablemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975)("the court's discretion [to award back pay] is equitable in nature"), or (2) class claims for equitable relief and legal damages, where such "final relief . . . [does not relate] exclusively or predominately to money damages." 1966 Advisory Committee Notes, 39 F.R.D. 69, 102 (1966); *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501 (5th Cir. 1981)(allegations of plantwide discrimination settled in exchange for program to improve job opportunities and a settlement fund). Because the claims in (b)(2) actions are essentially identical to one another, and the relief sought necessarily controls the defendant's future conduct towards the class, opting out of a (b)(2) suit for injunctive relief might well destroy the court's ability to impose a unitary rule.

Similarly, in a case certified under Rule 23(b)(1)(A), the class members' claims are intertwined and, in the absence of a mandatory class, the party opposing the class might be obligated to engage in incompatible conduct towards the individual members of the class. Thus, this provision applies when equitable concerns require the courts to reach a result "further[ing] interests of all class members that certainly would have been impaired if individual suits, with inevitably

disparate results, had been allowed." *Robertson v. National Basketball Ass'n*, 556 F.2d 682, 685 (2d Cir. 1977).

Under this analysis, it is plain that the MDL 633 class fell squarely within Rule 23(b)(3), with all its attendant procedural protections. The principal error of the MDL 633 court is that it focussed on the settlement agreement to determine which part of Rule 23(b) was appropriate, rather than on the plaintiffs' original claims for relief. Pet. App. 49a. All of the MDL 633 complaints sought (b)(3) certification, and all of the complaints principally sought money damages. While there were claims for injunctive relief, they sought little more than an order directing defendants not to violate the antitrust laws, something they clearly would not do again if they were held liable for treble damages. Moreover, the MDL plaintiffs never withdrew their damage claims, but instead simply agreed to abandon them in exchange for relief of questionable value -- characterized as "injunctive" -- plus $715,000 in attorneys' fees.

Indeed, even though the MDL 633 court characterized the relief as predominantly injunctive, Pet. App 49a, an examination of the settlement agreement demonstrates that its injunctive portion did not predominate and was of virtually no value. Thus, petitioners simply had to refrain for 18 months from rating bureau activity in six states -- the same six states that were still part of the FTC action against them. Aside from the fact that petitioners had already withdrawn from rating bureau activity in those states, Pet. App. 70a, everyone in the MDL 633 negotiation knew that the claims from these six states, which include Arizona and Wisconsin, were different from the claims in the other seven states and that there was at least a significant possibility that the state action defense did not have any force there. Moreover, the injunction did not prohibit the defendants from engaging in rating bureau activity in the other seven states where the state action defense already shielded the defendants from liability.

Therefore, the MDL 633 injunction did no more than permit the defendants to conduct business within the law.

The other principal provision of the settlement provided class members with enhanced insurance coverage, which the MDL court properly recognized was a hybrid type of damage relief that offered no direct benefit to any class member. Pet. App. 50a, 66a-67a. Since only a small number of claims are ever made on title insurance policies, and a much smaller number of these would exceed the original coverage, this "advantage" was not likely to benefit more than a few members of the plaintiff class. On the other hand, in exchange for these benefits, the settlement precluded all the damage claims of all the class members.

The justification offered by the MDL 633 court for nationwide certification under Rule 23(b)(2) was that the class "seeks to define the defendants' relationship with the world at large by seeking to limit the defendants' rating bureau activities." Pet. App. 49a (citing *Weiss v. York Hospital*, 745 F.2d 786, 806-807 (2d Cir. 1984)). However, because title services are regulated by each state, there is no legal basis to impose a single nationwide rule of conduct for the six defendant title insurance companies.[4] Furthermore, courts have only allowed Rule 23(b)(2) certification where classwide affirmative action by the defendant is essential and appropriate to remedy the plaintiffs' injuries or a significant threat of injury resulting from a present or impending violation of the law is likely to continue and is the essence of the injury. *Califano v. Yamasaki*, 442 U.S. at 701 (finding (b)(2) class relief would be appropriate because "[t]he ultimate question is whether a prerecoupment hearing is to be held [and] . . . [i]t is unlikely that differences in the factual

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[4]Indeed, it was necessary to submit the proposed settlement to the insurance department in each of the thirteen states in order to obtain the state insurance department's approval under its laws. Pet. App. 39a.

background of each claim will affect the outcome of the legal issue"); *Weiss*, 745 F.2d at 806-07, 829-31 (injunction tailored to prevent significant threat of future injury from further discriminatory practices); *Linquist v. Bowen*, 813 F.2d 884 (8th Cir. 1987)(requiring two federal agencies to coordinate nationwide remedial program to remedy improper recoupment procedures). The relief sought in the MDL 633 action did not exhibit either one of these characteristics, even on a statewide basis, let alone in all thirteen states.

The nature of the defendants' alleged illegal activities also limits the likelihood of future injury to the plaintiffs and, hence, the propriety of (b)(2) certification and the need for prospective relief. The violations of the antitrust laws alleged in MDL 633 consisted of conduct that occurs openly because petitioners' tariffs are publicly filed. The only question is whether the state action doctrine permitted joint filing and, once that is decided, injunctive relief is of little practical consequence. Indeed, the MDL 633 class was defined in June 1986 to include only purchasers of title services from January 1, 1981 to December 31, 1985. Pet. App. 37a. This was plainly a retrospective class and not one for which future injunctive relief would be expected or required. Moreover, because the purchase of title services is not a frequent activity for an individual, the injured parties are not likely to be subject to a continuing course of forbidden conduct if no injunction is issued.

The MDL 633 court also certified a mandatory class under Rule 23(b)(1)(A), giving as its sole reason the risk of "inconsistent restructuring of defendants' rating bureau activities." Pet. App. 48a (citing *Reynolds v. National Football League*, 584 F.2d 280, 283-84 (8th Cir. 1978)). This reasoning is inapplicable here, however, because even an individual determination that petitioners violated the antitrust laws, which would entitle the plaintiff to treble damages, would not impair any other suit, nor would a finding that there was no such violation. While an injunction against future unlawful conduct might have some *stare*

decisis effect, at least in the same state, even that would not prevent plaintiffs in other states from obtaining any relief to which they were entitled. *Compare Reynolds*, 584 F.2d at 284; *Robertson*, 556 F.2d at 685.

This analysis makes clear that, viewed either from the perspective of the original complaints, from the perspective of the claims precluded by the settlement, or from the perspective of the relief accorded in the settlement itself, MDL 633 was primarily a class action concerning money damage claims, and there was no basis whatsoever to certify the damage portion of the case under any part of Rule 23 other than subsection (b)(3). In taking this position, *amicus* is aware of cases such as *Wetzel v. Mutual Ins. Co.*, 508 F.2d 239 (3d Cir. 1975), supporting a preference for (b)(2) classes when a (b)(2) and (b)(3) are both available, but these cases assume that both are proper, which is plainly not the case here. Insofar as injunctive relief predominates, (b)(2) may be properly employed. Even there, however, as the brief *amicus curiae* of the Lawyers' Committee for Civil Rights Under Law acknowledges, Br. 19-20, especially with respect to the 1991 amendments to Title VII, where there are genuine claims for damages, class members should be allowed to opt out of the damages portion of the case, once the liability issue and the form of injunctive relief are determined. Moreover, since it is undisputed that certification under (b)(3) is by far the most protective of the rights of absent class members, the alternative provisions should be construed to be available only when the specific equitable reasons for their use are present, such that the lack of a mandatory, non opt out class would make class relief impossible.

While certification as a mandatory class did dispose of all the claims in MDL 633, the approach followed there would allow wholesale evasion of not only the opt out requirements in Rule 23(b)(3), but the requirement of Rule 23(c)(2) of the best practicable notice and the explicit right of class members to intervene or otherwise participate. If

certification under Rules 23(b)(1) and 23(b)(2) is supportable simply because it is efficient, then it would be available in most multi-party cases and would thereby obliterate the carefully constructed differences among the sub-parts of Rule 23. *See McDonnell Douglas Corp. v. U.S. Dist. Ct. for the Central District of California*, 523 F.2d 1083, 1086 (9th Cir. 1975)(expansive interpretation of Rule 23(b)(1) would render Rule 23(b)(3) "superfluous"); *In Re Dennis Greenman Securities Litigation*, 829 F.2d 1539, 1545 (11th Cir. 1987); *In re Bendectin Products Liability Litigation*, 749 F.2d 300, 305 (6th Cir. 1984). Whatever the theoretical merits of such a scheme, it is not the plan envisioned by the drafters of Rule 23.

Moreover, Rule 23 recognizes that absent plaintiffs have an interest in litigating the merits of a case in a forum of their own choosing. That forum might be more convenient, might apply different and perhaps more favorable law, and would afford the absent plaintiffs an opportunity to have their own counsel who could emphasize a different theory of the case or focus on different evidence. The MDL 633 court, however, took none of these interests into account. Accordingly, respondents, who were not given adequate notice, an opportunity to exclude themselves from the class, or even to appear in the litigation, cannot be bound by the settlement in MDL 633 to the extent that it applies to damage claims because the class there could be certified, if at all, only under Rule 23(b)(3).

II. THE MDL 633 COURT DENIED RESPONDENTS DUE PROCESS BY ITS REFUSAL TO PROVIDE A RIGHT TO OPT OUT.

If the Court concludes that the MDL 633 case was properly certified as a mandatory class under Rules 23(b)(1) and 23(b)(2), then it must address the question whether, under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Ninth Circuit was correct in holding that there would be

a violation of due process if respondents' damage claims were barred by *res judicata* in the absence of an opportunity to opt out of the MDL 633 litigation.[5]

According to petitioners' analysis, there is no automatic right to opt out in an action involving monetary claims. However, as this Court stated in *Shutts*, in no uncertain terms, in class actions wholly or predominately involving money damages:

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[5]Petitioners' first argument is that, because the MDL 633 case was in federal court, no due process objection can be raised to binding class members from anywhere in the United States, apart from any claimed right to opt out. Since due process is based on assuring fundamental fairness to the person whose rights are being affected, *see International Shoe Co. v. Washington*, 326 U.S. 310, 316-17 (1945), it is difficult to understand how it is fundamentally unfair for an absent class member from, for example, Maine, to be dragged into a Hawaii state court, while, at the same time, that same person can be dragged into a federal court in Hawaii that is located directly across the street from the state court. It is our understanding that respondents will answer this plea for the availability of nationwide mandatory plaintiff classes in federal courts, regardless of the class member's connection with the forum state, and so we will not address it here. We note, however, that petitioners never attempt to explain why their *Mathews* analysis is appropriate for deciding the due process issue as applied to the right to opt out, but not as to the availability of nationwide classes. While we believe that the balancing of the factors under *Mathews* strongly favors respondents, *see infra* 22 - 29, petitioners have entirely failed to consider the Arizona and Wisconsin class members' distance from the forum, a factor which further supports respondents' position under *Mathews*. In our view, the Court need not and should not decide the issue of nationwide mandatory classes for federal courts, since the judgment below can be affirmed on other grounds, and that issue has far reaching implications that should be addressed only when it is absolutely essential to do so.

> due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the Court.

472 U.S. at 812.

Shutts did not eliminate the mandatory class action in appropriate cases, and the Ninth Circuit decision below, refusing to impose *res judicata* as a bar against claims for monetary damages, does not render unconstitutional all mandatory class actions involving monetary claims. This Court limited its holding in *Shutts* "to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments." *Id.* at 811 n.3. In such a case, the right to opt out is required in order to protect an individual's constitutionally recognized property interest in a cause of action for damages. *Shutts*, 472 U.S. at 807; *Tulsa Collection Services v. Pope*, 485 U.S. 478, 485 (1988). Even where money damages is the sole remedy sought by the claimants, there are some cases, such as interpleader actions and limited fund cases properly certified under Rule 23(b)(1)(B), where there is no right to opt out because such a right would destroy the efficacy of such a proceeding. However, proper notice and some minimal contact with the forum state, perhaps less than due process requires for a defendant, would still be required, especially where substantial claims are at stake. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

Since there is no question that respondents have a protected property right in their claims for treble damages against petitioner, the issue here is whether respondents can be barred from litigating their claims for substantial monetary damages where they never had an opportunity to opt out of the class in MDL 633. In our view, and that of petitioners, the Court should apply the flexible approach adopted in decisions involving the issue of what process is due before

individuals can be deprived of liberty or property by the government. Of particular significance is *Mathews v. Eldridge*, 424 U.S. 319 (1976), which sets forth the test for determining "what process is due" before the government may deprive a person of an interest protected by the Constitution. Although *Mathews* arose in the administrative rather than the judicial context at issue here, the constitutional origins of the right, and the analysis required, are identical. *See Lassiter v. Department of Social Services*, 452 U.S. 18, 33 (1981)(due process standards are intended to ensure that "judicial proceedings are fundamentally fair").

In *Mathews*, this Court required the balancing of three separate factors to determine what process is due:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. And, in *Connecticut v. Doehr*, 111 S. Ct 2105 (1991), this Court recognized that, in a dispute between private parties, the burden of increased procedural protection often falls heaviest on the party who opposes the additional procedure. Therefore, while giving due consideration to any interest the government might have in providing additional protection or foregoing the additional burden, this Court also analyzed the private interest of the party who opposed the additional protections. Accordingly, we will consider each of the four factors in turn.

A. *The Private Interest in Favor of Additional Protection*

The property interest at stake when this litigation was instituted was each class member's claim against petitioners for treble damages, plus attorneys' fees, by reason of an alleged conspiracy to fix the price of title services in thirteen states. The filing of the civil actions followed the initiation of an enforcement proceeding against petitioners by the FTC, alleging substantially the same violations and involving the same thirteen states.

At the time that the original complaints were filed, it would have been possible to estimate roughly the value of each class member's claim.[6] The value of the claim would depend on the type of services rendered by the defendant and the price of the title insurance that was purchased from one of the six companies.[7]

Both the Third Circuit and the Ninth Circuit recognized that the degree of potential deprivation that may be created here by the decision not to allow an opt out was "substantial." Pet. App. 12a; *In re Real Estate*, 869 F.2d at 768. Thus, before the MDL 633 actions were consolidated,

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[6]In 1980, the United States, the State of Arizona, and private class representatives sued the same six defendants in Arizona state and federal courts for price fixing of escrow services. The district court rejected the state action defense and the filed tariff defense. *United States v. Title Ins. Rating Bureau of Arizona*, 517 F. Supp. 1053 (D. Ariz. 1981), *aff'd*, 700 F.2d 1247 (9th Cir. 1983), *cert. denied*, 467 U.S. 1240 (1984). Thereafter, settlements of $4.82 million were obtained. *In re Arizona Escrow Fee Litigation*, Civ. No. 80-840A PHX CAM (D. Ariz. September 22, 1982).

[7]For the years 1981 to 1985, the insurance companies in Arizona collected $137 million for title search services. Ariz. Dept. of Ins. Ann. Rep., 1981 to 1985. In Wisconsin, the companies received $76 million for the same time period. Wisc. Ins. Rep., 1981 to 1985.

12 separate private class actions had been filed, indicating that at least several class members and their counsel perceived their economic stakes in the litigation were sufficient to warrant an effort to recover substantial damage claims, at least in the context of a class action such as the one now before this Court. The permanent elimination of respondents' claims that the MDL 633 settlement agreement purports to effect, in and of itself, implicates respondents' due process rights. *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798 (1983); *cf. Greene v. Lindsey*, 456 U.S. 444, 446-47 (1982); *Mullane*, 339 U.S. at 306. Where property has been determined to be substantial in size, this Court has recognized that the private interest in additional process is significant. *Tulsa Collection Services*, 485 U.S. at 488-489; *Mennonite Board of Missions*, 462 U.S. at 798.

The right to opt out would have allowed respondents to preserve their substantial damage claims. Contrary to petitioners' suggestion, in this case respondents' interest in avoiding the *res judicata* effect of the MDL 633 judgment is not based on some abstract interest in controlling the MDL 633 litigation, but upon a concrete interest in obtaining the damages to which they are entitled and which class counsel in MDL 633 settled out from under them for no monetary relief.

B. *Risk of Erroneous Deprivation*

The MDL 633 case vividly illustrates the unfairness that can result from prohibiting persons from removing themselves from a settlement involving substantial damage claims. The purported elimination of respondents' damage claims is premised solely on the fact that respondents, like all other MDL 633 class members, purchased title services from petitioners from 1981 to 1985. However, respondents' interests did not coincide with the rest of the MDL 633 plaintiffs. Not only were some plaintiffs individuals, and others governmental entities, with claims of varying sizes, but none of the named plaintiffs purchased title services in

Arizona and Wisconsin, where petitioners could not successfully raise the state action defense to antitrust liability. By contrast, respondents had purchased title services in Arizona and Wisconsin, and the state action defense has no impact on their claims. The MDL 633 court ignored these variables and treated all plaintiffs the same -- all money damage claims were foreclosed as a condition of the settlement, despite the fact that the pivotal issue in the case, the applicability of the state action defense, by definition, applied differently in each state.[8]

In cases involving money damages, it is particularly important to guard against settlements that may benefit the class representatives, or their attorneys, at the expense of the absent class members. In MDL 633, lawyers, who believed that they saw the class claims evaporate with this Court's decision in *Southern Motor Carriers*, and consequently the elimination of their source for attorneys' fees, negotiated an agreement that would pay them $715,000 in fees and would give the appearance of a benefit to the class members. While some of the class members would not have obtained even a semblance of relief in the absence of the settlement, respondents, who are Arizona and Wisconsin residents, had viable damage claims that were entirely eliminated.

Courts have often demonstrated concern about the possibility of the damage claims of absent plaintiffs being foreclosed by a class action. *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 634-635 (9th Cir. 1982)(certification under (b)(2) limited to injunctive relief to protect opt out on damages in action alleging a pattern or practice of discrimination). The potential for diverging

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[8]In our view, this problem may have gone so far as to deny respondents the adequate representation that Rule 23 and due process requires. *See Hansberry*, 311 U.S. at 32. This presents another reason for this Court to adopt our Rule-bound rationale for affirmance.

interests in class actions involving substantial money damages has led some courts to recognize the need to allow absent class members the right to opt out of even purportedly "mandatory" classes. *Penson v. Terminal Transport Co.*, 634 F.2d 989, 994 (5th Cir. 1981)(allowing an opt out of a (b)(2) class action because, when individual monetary relief is sought, it "begins to resemble a 23(b)(3) action and there has been more concern with protecting the due process rights of the individual class members . . . ."); *Holmes v. Continental Can Co.*, 706 F.2d 1144; *Bogard v. Cook*, 586 F.2d 399 (5th Cir. 1978).

In other cases where no right to opt out exists, and where there are nonetheless claims for money damages, other safeguards exist that adequately compensate for the lack of an opt out right. Thus, where the interests of the class are unified, such that there is no possibility of differences among class members, the cohesiveness, coupled with adequate representation, provides an appropriate alternative protection. *Califano*, 442 U.S. 682 (class sought equitable relief concerning procedures for recouping Social Security overpayments); *Wetzel*, 508 F.2d at 251 ("cohesive characteristics of the class are the vital core of a (b)(2) action"). In such cases, due process is satisfied because there was adequate representation, the representative plaintiffs' claims were truly typical, adequate notice was given, and, in certain cases, the absent plaintiffs were afforded an opportunity to assert individual claims in the same action. *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1166 (5th Cir. 1978); *King v. South Central Bell Tel. & Tel. Co.*, 790 F.2d 524 (6th Cir. 1986)(plaintiff received individual notice that settlement adjudicated claims arising out of maternity leave policies and that she had opportunity to make personal claim for monetary relief and/or object to the settlement). However, in a case such as MDL 633, where the differing law of each affected state causes the interests of the class members to diverge, these procedural protections would not satisfy due process because

they are not sufficient to protect against the risk of erroneous deprivation.

C. *The Government Interest*

We acknowledge that there is a strong government interest in efficient and speedy resolution of claims through the class action and Multidistrict Litigation procedures. However, these interests are counterbalanced by the interests of Arizona and Wisconsin in ensuring that these procedures are not misused to settle cases at the expense of their citizens who neither know their rights are being resolved, nor have an opportunity to protect themselves by opting out of the settlement class. Moreover, while settlements are encouraged, it has never been held that such an interest invariably overrides the interest of those affected by the judgment. *Cf. Martin v. Wilks*, 490 U.S. at 768.

In any event, permitting an opt out would not be a major disincentive to settlement for several reasons. First, cases certified under Rule 23(b)(3) already give class members that opportunity, and yet many class actions, both large and small, are settled, including many where some of the claimants have very substantial claims. Second, even if there had been an opt out for the seven states where petitioners had the benefit of the state action defense, it is highly unlikely that many members would have chosen that option, given the minimal likelihood that they would have proceeded, let alone succeeded, on their own. And, where settlements provide meaningful benefits, unlike in the MDL 633 action, very few claimants will choose to run the risk of bettering the outcome by filing their own individual actions, unless they have very large claims and a strong likelihood of success.

D. *Petitioners' Interest Against Additional Protection*

Petitioners may contend that they have relied on the settlement for the past seven years and have faithfully executed their part of the agreement. This interest in repose

exists in all cases that are resolved by settlement or by litigation, but it is only one factor and must be viewed against the backdrop of class action litigation. The Third Circuit recognized in its decision allowing collateral attack on the MDL 633 judgment that:

> it is partly up to the defendants to safeguard the interest of the absent plaintiffs. *See* [*Shutts*,] 472 U.S. at 810. If the defendant wishes to achieve maximum preclusive effect, it is up to the defendant to insure that the class is appropriately certified, and the absent members are adequately represented. Far from wreaking havoc on the class action mechanism, we believe that our holding will foster results that most fairly balance the interests of absent class members and defendants alike.

In re Real Estate, 869 F.2d at 770. While petitioners' interest in repose is entitled to consideration, as in all cases where a collateral attack is made on a previous judgment, this interest has never been and should never be, deemed dispositive. *See Hansberry*, *supra*.

Moreover, the actual cost of petitioners' reliance on the *res judicata* effect of the MDL 633 settlement is minimal. The injunctive relief required by the settlement merely required petitioners to abide by the law, consistent with the state action doctrine. The enhancement provisions of the settlement do result in a small shifting of risk from class members benefitting from the provisions to the petitioners, but the cost of these provisions in terms of real dollars is probably quite small because they only benefit policy holders who have title insurance claims, and even then, only those very few whose claims exceed the original policy limits. Furthermore, petitioners retain all of the benefits of the MDL 633 settlement agreement, except as to the damage claims of Arizona and Wisconsin claimants who are respondents here.

Thus, the alternative in this case, as it would be in most other cases, is not thousands of individual actions, but a class action encompassing those absent plaintiffs injured by defendants' activities who feel strongly enough to litigate the issue on their own, as do the Arizona and Wisconsin respondents here.

E. *The Balance Lies Decidedly In Respondents' Favor*

Having reviewed all four factors, the Court must strike an appropriate balance to decide whether the protection given absent class members was adequate. While this balance is "not susceptible of mechanical application . . .," *Kulko v. Superior Court of California*, 436 U.S. 84, 92 (1978), when judged by the standard of *Mathews v. Eldridge*, there can be no doubt that respondents will only receive the process that they are due if the judgment below is affirmed. *See also Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). The viability of claims asserted in the MDL 633 action hinged entirely on state law which differed in each of the affected states. Absent plaintiffs from Arizona and Wisconsin had substantial damage claims of varying amounts that were unaffected by the state action defense. However, in an effort to dispose of a complex case, a settlement agreement was reached and approved by the MDL 633 court that eliminated the substantial money damage claims of Arizona and Wisconsin plaintiffs for nothing. Arizona and Wisconsin have a strong interest in ensuring that plaintiffs from those states are not deprived of those claims. While there is an interest in the efficient resolution of all claims and in repose, these interests do not justify foreclosing respondents' claims. Based on all these considerations, the only way that respondents will receive all the process to which they are due is for this Court to refuse to foreclose their substantial damage claims by application of the doctrine of *res judicata*.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be affirmed.

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(12)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

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Petitioners,

v.

WALTER THOMAS BROWN and JEFFREY L. DZIEWIT,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* OWENS-ILLINOIS, INC. IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICUS CURIAE* OWENS-ILLINOIS, INC. IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Owens-Illinois, Inc. ("Owens-Illinois") respectfully submits this brief as *amicus curiae* in support of Respondents with the consent of the parties. The letters of consent from counsel for Petitioners and Respondents have been filed with the Clerk of the Court.

Owens-Illinois has a significant interest here because it is one of the defendants in the asbestos-related personal

injury litigation. Owens-Illinois is, and always has been, primarily a manufacturer of glass bottles and jars. Its involvement in the asbestos-related personal injury litigation stems from a single type of insulation material known by the name "Kaylo," which contained approximately 15% asbestos. Owens-Illinois first manufactured Kaylo in commercial quantities in the late 1940's, and it ceased all manufacture of this product in April 1958—longer than three decades ago.

Today, because of this single product that it ceased making 35 years ago, Owens-Illinois is one of the defendants in tens of thousands of personal injury cases across the country. The Judicial Panel on Multidistrict Litigation has transferred virtually all of the approximately 30,000 asbestos cases pending in federal court to Judge Charles Weiner of the U.S. District Court for the Eastern District of Pennsylvania. *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991).

In January 1993, a purported class action was filed in federal court in Philadelphia that seeks judicial approval of a prearranged settlement of all *future* asbestos claims against the twenty companies represented by the Center for Claims Resolution ("CCR"). *Carlough v. Anchem Products, Inc.*, No. 93-CV-0215 (E.D. Pa. filed Jan. 15, 1993) ("CCR Class Action"). (Reported decisions in this case include *Carlough*, No. 93-CV-0215, 1993 WL 399674 (E.D. Pa. Oct. 6, 1993); *Carlough v. Anchem Products, Inc.*, No. 93-1482, 1993 WL 492511 (3d Cir. Dec. 1, 1993).) The CCR Class Action is based on the federal court's diversity jurisdiction under 28 U.S.C.A. § 1332 (Supp. 1993), and the named plaintiffs allege that they represent a class including a substantial number of persons who have no contact with Pennsylvania. The CCR Class Action is opposed by many class members. *See* Frederick M. Baron, *An Asbestos Settlement With A Hidden Agenda*, Wall St. J., May 6, 1993, at A15.

Although Owens-Illinois is not a party to the CCR Class Action, it is vitally concerned with the question whether the federal courts in diversity cases have the authority under the Due Process Clause to enter judgments that bind absent class members having no contact with the forum state. The prearranged settlement of the CCR Class Action, if approved, would adversely affect Owens-Illinois' contribution and settlement credit rights. Owens-Illinois submits that in general this question should be answered in the negative, and therefore it urges this Court to affirm the judgment below. There should be, however, an important exception to this general rule for class actions under Fed. R. Civ P. 23(b)(1)(B) where the defendant holds a "limited fund" and suits by individual members of a class would result in an inequitable distribution of the defendant's resources.

SUMMARY OF ARGUMENT

The due process principles addressed in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), should apply with equal force to class actions in federal court, especially where jurisdiction is based on diversity. With respect to personal jurisdiction, a federal court sitting in diversity is not subject to different due process principles than is a state court. A nationwide mandatory class action for money damages, based solely on diversity jurisdiction, can satisfy due process only where the case involves a limited fund.

In *Ticor Title*, the Court should apply *Shutts* to federal court class actions for money damages. This Court should recognize, however, that in some circumstances a nationwide mandatory class action under Fed. R. Civ. P. 23(b)(1)(B) may be the *only* fair way to apportion a "limited fund" held by a defendant. A right to "opt out" of a limited fund class action causes the claimants to compete for the fund and creates a risk of unfair dis-

tribution. Where, however, a defendant's assets are adequate to satisfy the claims against it, and a diversity class action is being used merely to impose a global settlement, the Due Process Clause should prohibit the entry of any judgment purporting to bind class members having no contact with the forum state.

ARGUMENT

I. FEDERAL COURTS, IN THE ABSENCE OF A FEDERAL STATUTE EXTENDING THEIR JURISDICTION, SHOULD BE SUBJECT TO THE SAME DUE PROCESS LIMITS AS STATE COURTS

In *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985), this Court held that a forum state may bind an absent class member concerning "a claim wholly or predominantly for money damages" only by providing minimal due process protection, including the opportunity for class members to "opt out." *Id.* at 811-12. The due process principles articulated in *Shutts* concern both procedural fairness and the question of jurisdiction over class members who are "absent" in the sense that they are unnamed in the complaint and have no contact with the state in which the forum federal court sits.

Petitioners' argument that due process concerns with respect to plaintiff classes are different in federal courts than in state courts is not analytically sound. Under Petitioners' theory, a federal court exercising diversity jurisdiction could bind "absent" class members through a mandatory class, but a state court in the same forum with the same case could not. This result is more consistent with *Swift v. Tyson,* 16 Pet. 1, 41 U.S. 1 (1842), than with federalism. It is also inconsistent with the jurisdictional rules that apply in federal court cases whether they are based upon diversity of citizenship or a federal question: Due process requires "minimum contacts" with the forum *state* for personal jurisdiction in both state and federal courts. *See International Shoe Co. v. Washington,*

326 U.S. 310 (1945); *In re Real Estate Title,* 869 F.2d 760, 766 n.6 (3d Cir.) (minimum contacts requirement for personal jurisdiction applies to federal courts having subject matter jurisdiction on the basis of diversity of citizenship or a federal claim), *cert. denied,* 493 U.S. 821 (1989). In the absence of a specific statute providing for nationwide service of process, personal jurisdiction over nonresident defendants can be based only on their amenability to service under state long-arm statutes, *Omni Capital Int'l v. Rudolf Wolff & Co.,* 484 U.S. 97 (1987); Fed. R. Civ. P. 4 (incorporating the manner of serving process prescribed by the law of the state in which the federal court is sitting or the law of the state in which service is made), and the same principle should be applied to absent class members in class actions for money damages.

The CCR Class Action has given the Third Circuit the "opportunity to examine *Shutts* and to reaffirm the critical importance of the right to opt out in drawing any inference of consent to jurisdiction by absent class members who otherwise would have no affiliation with the forum." *Carlough v. Anchem Products, Inc.,* No. 93-1482, 1993 WL 492511, at *7 (3d Cir. Dec. 1, 1993). The CCR Class Action is based solely upon diversity, and the Third Circuit held that "the minimum contacts requirement for personal jurisdiction applies to *federal courts* having subject matter jurisdiction on the basis of diversity of citizenship as well as cases brought on the basis of a federal claim." *Id.* at *6 (citing *In re Real Estate Title,* 869 F.2d at 766 n.6) (emphasis supplied). Consequently, the Third Circuit found that the district court lacked personal jurisdiction over absent class members before the class members were given the right to opt out:

> We do not believe that the mere promise, even certain eventuality, that the opportunity to opt out of the class will be offered to absent class plaintiffs satisfies the requirements of due process as defined by *Shutts*. . . . Because of this emphasis by the Supreme Court [in *Shutts*] on *the receipt of the opt out forms,*

> we reject the district court's implication here that the opt out requirement is satisfied in all cases where a class action will provide for the opportunity to opt out.
>
> Thus, prior to notice and the opt out period, and absent minimum contacts with the Pennsylvania forum or consent to its jurisdiction, a federal injunction enjoining state action would violate due process.

Id. at *8 (emphasis supplied).

The Third Circuit thus appropriately focused on "the receipt of the opt-out forms" by the putative class members as an essential element of due process under *Shutts*. The Due Process Clause should permit nothing less.

II. WHERE A CLASS ACTION SEEKS DAMAGES FROM A LIMITED FUND, DUE PROCESS SHOULD PERMIT ABSENT CLASS MEMBERS TO BE BOUND WITHOUT A RIGHT TO OPT OUT

A limited fund class action under Fed. R. Civ. P. 23(b)(1)(B) can ensure that competing claims to limited funds are equitably apportioned. A limited fund is triggered where separate actions "create a risk of . . . adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interest of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests . . . ." Fed. R. Civ. P. 23(b)(1)(B). The 1966 advisory committee notes to Fed. R. Civ. P. 23 explicitly recognize the existence of limited fund class actions under subsection (b)(1) of the Rule. Advisory Committee's Note to Rule 23, 39 F.R.D. 98 (1966).

The concept of mandatory Rule 23(b)(1)(B) class actions has been endorsed by a number of the lower federal courts, including the Ninth Circuit. *See, e.g., In re Northern Dist. of Cal. Dalkon Shield I.U.D. Prod. Liab. Litig.*, 693 F.2d 847, 852 (9th Cir. 1982) (although

class certification was reversed, the court stated that a Rule 23(b)(1)(B) class may be appropriate when separate punitive damage claims necessarily will affect later claims), *cert. denied*, 459 U.S. 1171 (1983); *McDonnell Douglas Corp. v. U.S. Dist. Court*, 523 F.2d 1083, 1086 (9th Cir. 1975) (permitting class certification under 23(b)(1)(B) only if separate actions "inescapably will alter the substance of the rights of others having similar claims"), *cert. denied*, 425 U.S. 911 (1976); *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 467 (9th Cir. 1973) (classes seeking limited fund certification must demonstrate that "individual action inescapably will alter the substance of the rights of others having similar claims"); *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300 (6th Cir. 1984) (endorsing limited fund theory as a justification for a punitive damages class certification, but held class certification was inappropriate because of lack of evidence of a limited fund); *In re Agent Orange Prod. Liab. Litig.*, 100 F.R.D. 718, 724-28 (E.D.N.Y. 1983) (certification of a group of plaintiffs claiming injury from "Agent Orange"), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407, 1417-18 (E.D.N.Y. 1989) (plaintiffs met "substantial probability" test that their claims, if sustained, exceeded the defendant's assets, and therefore case was appropriate for 23(b)(1)(B) certification), *aff'd*, 907 F.2d 1295 (2d Cir. 1990).

The Ninth Circuit in *Ticor Title* recognized that a class judgment granting injunctive relief, as opposed to money damages, could bind absent plaintiffs even without an opt-out right, because there is no fair alternative. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. granted in part*, 62 U.S.L.W. 3205 (U.S. Oct. 5, 1993) (No. 92-1988). Similar considerations support a mandatory class action involving claims for money damages where the defendant's financial resources are inadequate to satisfy the claims of the plaintiff class. A na-

tionwide mandatory class action under Rule 23(b)(1)(B) may be the only fair way to divide a limited fund, and in that event fundamental fairness may justify the loss of the right to opt out of the class. The only alternative might be a multistate scramble for assets that could hardly be characterized as due process of law.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION OF LESLIE O'NEAL, SEAN JONES, KEN NORTON, JR., WILLIAM C. MATTHEWS, CRIS DISHMAN, ERIC ALLEN, AND VAN WAITERS FOR LEAVE TO FILE BRIEF OF AMICI CURIAE OUT OF TIME

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MOTION

NFL players Leslie O'Neal, Sean Jones, Ken Norton, Jr., William C. Matthews, Cris Dishman, Eric Allen and Van Waiters respectfully move the Court for leave to file their brief as amici curiae in the above captioned case out of time. Due to technical and printing difficulties, these amici were unable to file their brief with the Supreme Court by 3:00 p.m. on December 14, 1993. The brief was mailed as soon as practicable on December 14, 1993.

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ON WRIT OF CERTIORARI TO
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1987), cert. denied, 485 U.S. 909 (1988) 16

In re Real Estate Title & Settlement Services
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(3d Cir.), cert. denied, 493 U.S. 821 (1989) 16

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Amendments to Rules of Civil Procedure, 383 U.S. 1029 (1966) 14

Chafee, Zechariah, Jr., Some Problems of Equity (1950) 5, 7, 9

Cohn, Sherman L., The New Federal Rules of Civil Procedure, 54 Geo. L.J. 1204 (1966) 11

Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Amendments to the Rules of Civil Procedure, 34 F.R.D. 325 (1964) 13

Fed. R. Civ. P. 23, Advisory Committee Notes 12, 13, 21

Frankel, Marvin E., Amended Rule 23 From a Judge's Point of View, 32 Antitrust L.J. 295 (1966) 14, 15

Frankel, Marvin E., Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39 (1967) 14

Jost, Kenneth, Tampering With Evidence: The Liability and Competitiveness Myth, A.B.A. J. 44 (Apr. 1992) 23

Kaplan, Benjamin, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356 (1967) 11, 12

Manual for Complex Litigation, Second (1985) 16, 22

Moore, James W., Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Geo. L.J. 551 (1937) 9

3B Moore, James W. & John E. Kennedy, Moore's Federal Practice (2d ed. 1993) ..... passim

1 Newberg, Herbert B. & Alba Conte, Newberg on Class Actions (3d ed. 1992) 7, 8, 12

3 Newberg, Herbert B. & Alba Conte, Newberg on Class Actions (3d ed. 1992) 16

Saks, Michael J., Do We Really Know Anything About the Behavior of the Tort Litigation System --And Why Not?, 140 U. Pa. L. Rev. 1147 (1992) 23

Suits by Firms Exceed Those By Individuals, Wall St. J., Dec. 3, 1993, at B1 24

Wright, Charles A., Proposed Changes in Federal Civil, Criminal and Appellate Procedure, 35 F.R.D. 317 (1964) 13, 14

7A Wright, Charles A., et al., Federal Practice and Procedure: Civil (2d ed. 1986) 5-8

7B Wright, Charles A., et al., Federal Practice and Procedure: Civil (2d ed. 1986) 6, 13, 15, 16

9 Wright, Charles A., & Arthur R. Miller, Federal Practice and Procedure: Civil (1971) 19

Yeazell, Stephen C., From Group Litigation to Class Action, Part I: The Industrialization of Group Litigation, 27 UCLA L. Rev. 514 (1980) 4

Yeazell, Stephen C., From Group Litigation to Class Action, Part II: Interest, Class and Representation, 27 UCLA L. Rev. 1067 (1980) 7

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INTEREST OF AMICUS CURIAE

Trial Lawyers for Public Justice, P.C. ("TLPJ") is a national public interest law firm devoted to representing victims of corporate and government abuse. TLPJ has pioneered cases in toxic torts, environmental protection, civil rights, civil liberties, consumer safety, and employee protection. Supported by more than 1,300 trial lawyers throughout the United States, TLPJ is dedicated to using plaintiffs' tort law and trial law for the public good and to vindicate the rights of individuals.

The present case raises significant issues regarding the protection of due process rights of individual victims in class action proceedings. In Phillips Petroleum v. Shutts, 472 U.S. 797 (1985), this Court held that individual class members in a state court action have a due process right to opt out of class actions wholly or predominately for money damages. Petitioners, however, urge this Court to now hold that individual class members have no such right in identical cases filed in federal courts. TLPJ submits this brief because we believe, and the constitutional history of class actions demonstrates, that the right to opt out is as important to individual class members in federal court cases as in state courts cases--and is a fundamental element of due process.[1]

SUMMARY OF ARGUMENT

Rooted deep in our historic tradition is the fundamental principle that each individual must be afforded the opportunity for his own day in court. Class actions have been an exception to this principle--but an exception of only limited scope and of

[1] Pursuant to Rule 37 of the Rules of this Court, TLPJ has obtained the consent of the parties to the filing of this brief. The parties' letters of consent have been filed with the Clerk of Court.

application only when it is manifest that the due process rights of absent class members will be assured.

In their early development, class actions were strictly circumscribed to situations involving cohesive groups, common property and equitable relief. Over the years, the doctrine expanded to encompass damages at law and more diffuse groups and more abstract legal relationships. But as the power of the class device has grown, so too has judicial recognition of the constitutional imperatives of due process protections for each individual class member. Thus, this Court's decision in Shutts, recognizing the constitutional import of the right to opt out of a state court class action, is but one in a line of modern decisions emphasizing the due process implications of this powerful procedural device.

In the present case, petitioners argue that the Shutts due process protections do not apply in federal court. Petitioners' assault on due process rests upon two arguments: the jurisdictional reach of federal courts and a "procedural fairness" analysis. TLPJ, in this brief, does not address the jurisdictional issue since, it respectfully submits, the procedural fairness/due process analysis so forcefully supports the right to opt out of a federal class action wholly or predominately for damages at law.

Petitioners' arguments to the contrary are based upon an erroneous view of the historical and constitutional bases of class actions. Petitioners argue that there is no distinction, from a constitutional perspective, between damage claims and equitable relief. However, this distinction has long been recognized in the common law and is incorporated in Rule 23 of the Federal Rules of Civil Procedure. Injunctive relief, by its very nature, is unitary and must be imposed upon a group as a whole to be effective. Similarly, when a common fund is involved, the rights of each stakeholder are necessarily intertwined, whether or not each person is defined as a class member. By contrast, in most cases at law, damage claims

present issues unique to each individual. Class members in these cases often share nothing in common except for vague, abstract legal rights. As the scope of the class broadens in this manner, and the interests of individuals diverge, it becomes more difficult to ensure the rights of class members. This requires a heightened due process scrutiny--and, by necessity, a right to opt out.

In the present case, the fact that the original class in the Multidistrict Litigation proceeding was certified as a mandatory class under Rule 23(b)(1) and (b)(2) is not controlling. First, it is clear that this certification was in error, at least with respect to the substantial damage claims. Second, the label given to a class under Rule 23(b) cannot be used to circumvent the constitutional rights of absent class members.

In their brief, petitioners venture far beyond a discussion of what is a proper mandatory class and far beyond the contours of their own antitrust case. Indeed, petitioners conclude their brief with a suggestion to redraft Rule 23 to eliminate the statutory right to opt out even in a (b)(3) class action solely for damages. The alleged basis for this radical proposal is petitioners' assertion that mandatory damage classes are needed to resolve the recent "explosion of duplicative litigation," particularly in the mass tort context. Brief of Petitioners at 29. This allegation regarding the burden of mass tort litigation on the federal courts lacks--and is indeed contrary to--supporting empirical evidence. Moreover, mass tort actions are among the cases least suited for class action treatment of any type because tort damage claims are typically highly individualized and unliquidated. In their sweeping plea for the extension of mandatory classes, petitioners demonstrate a fundamental misunderstanding of the historical and constitutional framework underlying the class action doctrine. The vast power and reach of any class action, and most particularly a nationwide class action for damages at

law, mandate that each individual's due process rights be jealously guarded.

ARGUMENT

I. THE HISTORY OF CLASS ACTIONS ESTABLISHES THE RIGHT TO OPT OUT AS A CONSTITUTIONAL MANDATE IN A CLASS ACTION INVOLVING CLAIMS WHOLLY OR PREDOMINATELY FOR DAMAGES AT LAW

A. The Early Years of Class Actions: Cohesive Groups and Common Funds

1. The Early Years in England

In England, the history of group litigation reaches back, perhaps to the Twelfth Century, with suits involving villagers or parishioners in a collective, medieval agricultural society. Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action 38-39 (1987). Through the Seventeenth Century, and into the courts of Chancery with Bills of Peace, group litigation was a natural--and necessary--phenomenon in a society dominated by cohesive social and economic groups whose members' interests were indispensably linked together. Id. at 104; Stephen C. Yeazell, From Group Litigation to Class Action, Part I: The Industrialization of Group Litigation, 27 UCLA L. Rev. 514, 515-16 (1980). Indeed, this early period was a "world in which group litigation may not have made a great deal of difference because the line between the recognition of a litigative entity and the effects of simple stare decisis was thin indeed." Id., 27 UCLA L. Rev. at 519.

2. The Early Years in the United States

The English experience did not transfer intact to the United States. Among other factors, in the United States, unlike in England, "we had to worry about the 'due process' clause." Zechariah Chafee, Jr., Some Problems of Equity 225 (1950). As Professor Chafee stated in his classic treatise:

> However convenient class suits may be, it is obvious that they do not comply with some well-recognized general principles of law. The incongruity which startles us today is the disregard of the requirement that a man ought to have his day in court--his rights and duties should not be adjudicated in his absence.

Id. at 203.

Early American efforts to reconcile group litigation and due process, and to determine the res judicata effect of class judgments on nonparties, were marked by "considerable uncertainty." 7A Charles A. Wright et al., Federal Practice and Procedure: Civil § 1751, at 12 (2d ed. 1986). For example, Federal Equity Rule 48, adopted in 1842, provided general guidance for class suits and ended with the directive that "in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties."[2] But a decade later, in

[2] Federal Equity Rule 48 stated, in full:

> Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

42 U.S. (1 How.) lvi (1842).

one of the first class suits in the United States, the Supreme Court ignored this clear mandate--and indeed never even cited Rule 48--and stated that "the decree binds all of them the same as if all were before the court." Smith v. Swormstedt, 57 U.S. (16 How.) 288, 303 (1853).

Petitioners' assertion that Smith demonstrates the long history of "mandatory classwide adjudication of monetary claims" is a gross simplification, and, indeed, a misreading of the case. See Brief of Petitioner at 9. Smith involved a dispute over a common fund, or, in the words of the Court, "an object common to them all." 57 U.S. (16 How.) at 302.[3] With such a fund, the claims of class members are necessarily intertwined and must be adjudicated as a group. In addition, the language in Smith regarding the binding effect of a decree was only dicta since a court may not determine the res judicata effect of its own judgment, and Smith did not involve a collateral attack. See 7B Wright et al., supra, § 1789, at 245.

Moreover, following Smith, the Court vacillated on the issue of the binding effect of judgments. In Wabash R. R. v. Adelbert College, 208 U.S. 38, 58 (1908) the Court found no binding effect on absent members because "injustice might result, and even collusive suits might be encouraged." Then, in 1912, Equity Rule 38 replaced old Rule 48, and omitted the last sentence regarding the binding effect of decrees.[4] Nevertheless, the "confusion and uncertainty" continued. 7A Wright et al., supra, §1751, at 13. In Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921), the Court noted the desirability of binding decrees (in a case, once again, involving a common fund). But the Court "revived some of the doubt" in Christopher v. Brusselback, 302 U.S. 500 (1938), by limiting the binding effect of decrees. 7A Wright et al., supra, §1751, at 14.

In short, in these early years in the United States, the class action doctrine was ill-defined, and class suits "never found a regular or essential place in group litigation." Stephen C. Yeazell, From Group Litigation to Class Action, Part II: Interest, Class and Representation, 27 UCLA L. Rev. 1067, 1095 (1980) [hereinafter Yeazell, Interest, Class and Representation]; Chafee, supra, at 199. Class actions were infrequent and primarily restricted to cases involving common funds and groups whose interests were inextricably intertwined. See, e.g., Yeazell, Interest, Class and Representation, supra, at 1095 (class actions in this period were used principally in inheritance litigation and creditors' suits "to achieve something like an equitable marshalling of assets.").

In addition, class suits in the United States were originally limited to equity actions:

> This was true not only because of the rigid common law rules discouraging joinder of parties inherited from England but because the machinery of the law courts was not well adapted to protect the rights of unknown, unnamed, or nonparticipating persons whose interest in the dispute might be concluded by the litigation.

7A Wright et al., supra, § 1751, at 11 (emphasis added); see also 1 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 1.09, at 1-24 n.85 (3d ed. 1992). Not until the merger of law and equity, and original Rule 23, did class

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3 The common fund in Smith was a church's endowment "for the relief of distressed traveling preachers." Id. at 303. The fund became the subject of dispute when Northern and Southern preachers split over the issue of slavery. Id. at 296.

4 Federal Equity Rule 38, in full, stated, "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." 226 U.S. app. at 11 (1912).

action suits for damages at law become available in federal courts. 1 id. at 1-25.

3. Original Rule 23

Original Rule 23, Fed. R. Civ. P., promulgated in 1937, specifically defined three categories of classes. Only two of the categories--"true" and "hybrid"--bound an entire class to any judgment. See generally 3B James W. Moore & John E. Kennedy, Moore's Federal Practice ¶ 23.02-1, at 23-73 (2d ed. 1993). Mirroring the case law of that time, these two categories applied in only limited circumstances. "True" classes involved principles of compulsory joinder and were based upon "common and undivided" rights. 3B id.; Snyder v. Harris, 394 U.S. 332, 335 (1969). "Hybrid" classes were restricted to "specific property involved in the action."[5]

The third category under the rule--the common question class--was not really a class action at all. 7A Wright et al., supra, § 1777, at 517. Called a "spurious" class, this third type was in reality nothing more than a device for permissive joinder. 7A id. § 1752, at 29.[6] A judgment in a "spurious" class was binding only upon the parties and class members who affirmatively chose to intervene in the action; in other

[5] "True" classes were defined by the rule as involving rights which were "joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it." "Hybrid" classes involved rights which were "several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action." Fed. R. Civ. P. 23(a)(1), (2) (1938), 28 U.S.C. app. at 6101 (1964).

[6] "Spurious" classes were defined by the rule as involving rights which were "several, and there is a common question of law or fact affecting the several rights and a common relief is sought." Fed. R. Civ. Pro. 23(a)(3) (1938), 28 U.S.C. app. at 6101 (1964).

words, a type of opt-in procedure. 3B Moore & Kennedy, supra, ¶ 23.02-1, at 23-73.[7]

Thus, original Rule 23 reflected the traditional doctrine of restricting class actions--at least those with binding effect--to a narrow category of cases where the members' rights were, in essence, indivisible. The earlier cases of Smith and Supreme Tribe of Ben-Hur, for example, where the Court had found a binding effect, would have been classified as "true" class actions under original Rule 23 because of the unitary interests of the class. Moore, supra, 25 Geo. L.J. at 573.

B. The Modern Era: The Extension of Class Actions and The Increasing Recognition of Due Process Rights

1. The Decisions in Hansberry and Mullane

In the wake of original Rule 23, this Court began to lay the foundation for its modern analysis of due process protections for individual class members with its opinions in Hansberry v. Lee, 311 U.S. 32 (1940), and Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Neither case was actually decided under Rule 23. Yet to this day these two decisions stand as exemplars of due process analysis in class actions.

In Hansberry, this Court refused to bind persons to an earlier judgment upholding a restrictive racial covenant, emphasizing the lack of adequate representation of absent parties:

[7] Actually, original Rule 23 itself did not discuss the binding effect of the various types of classes, nor coin the terms by which the categories were to become known. Instead, Professor Moore advanced the terms "true," "hybrid" and "spurious" and defined the preclusive effect of judgments under each type. James W. Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Geo. L.J. 551 (1937). Moore's writings "had almost as much influence upon the judges as if it had been embodied in Rule 23." Chafee, supra, at 251.

> Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.

311 U.S. at 45.

Although Hansberry has come to stand primarily for the principles of adequate representation, the Court in Hansberry did not limit due process to this one protection. Indeed, the Court noted that there are no "particular rules" for a due process analysis. Id. at 42. Instead, the Court stated:

> [T]here has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.

Id.

In Mullane, the issue was the adequacy of notice to beneficiaries of a common trust fund. As in Hansberry, the Court focused its analysis on one aspect of due process, but clearly stated that due process was not limited to this one element:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

339 U.S. at 313 (emphasis added). The Court held that notice by publication alone was constitutionally deficient and that all beneficiaries with known addresses were due individual notice.[8]

2. The 1966 Amendments to Rule 23

The 1966 amendments to Rule 23 ushered in a sweeping expansion of the reach of class actions. At the same time, however, there was an increased recognition of the need to diligently protect the due process rights of absent class members.

These amendments brought Rule 23 to essentially its present form.[9] "True," "hybrid" and "spurious" classes were transformed, in one manner or another, into classes under new subsections (b)(1), (b)(2) and (b)(3). The new (b)(1) and (b)(2) actions--i.e., mandatory classes--generally tracked those types of class actions traditionally found to have preclusive effect. The (b)(1) class applied to situations where individual actions would create a risk of "inconsistent or varying adjudications. . . which would establish incompatible standards

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[8] The Court stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id. at 314. The Court also added, "[W]hen notice is a person's due, process which is a mere gesture is not due process." Id. at 315.

[9] For discussion of the 1966 amendments, see Benjamin Kaplan, Continuing work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356 (1967) and Sherman L. Cohn, The New Federal Rules of Civil Procedure, 54 Geo. L.J. 1204 (1966).

of conduct" or which would "as a practical matter be dispositive of the interests of the other members not parties." Fed. R. Civ. P. 23(b)(1). In large part, the (b)(1) class was based on principles of joinder. Fed. R. Civ. P. 23, Advisory Committee Notes (1966 Amendment) [hereinafter Advisory Committee Notes]. The (b)(2) class was primarily for injunctive or declaratory relief, Fed. R. Civ. P. 23(b)(2), and did not extend to cases "exclusively or predominately" for money damages. Advisory Committee Notes, supra.[10]

In contrast, the new (b)(3) opt-out class represented a sharp break with the history of class actions insofar as it applied the class device to "common question" cases seeking damages at law.[11] The Preliminary Draft of the new rule, published in 1964, was so extreme that it provided only a limited opt-out right in (b)(3) actions, stating:

> In any class action maintained under subdivision (b)(3), the court shall exclude those members who, by a date to be specified, request exclusion, unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor.

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[10] See also 1 Newberg & Conte, supra, § 1.22, at 1-51 (these two mandatory classes "are analogous to interpleader or quasi-in-rem suits in which equitable circumstances dictate the need for a unitary adjudication regardless of the individual consent of the parties affected.").

[11] Two primary considerations led to the revision of the old "spurious" class. One was a concern about the unfairness of one-way intervention in "spurious" suits, where class members--at no risk of being bound by an unfavorable judgment--could intervene after an adjudication favorable to the class but prior to formal judgment. 3B Moore & Kennedy, supra, ¶ 23.60, at 23-439. The other major concern was the viability of small-claims class actions, whose members may have lacked sufficient incentive to take the affirmative action of opting into a class suit. Kaplan, supra, at 397-98.

Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Amendments to the Rules of Civil Procedure, 34 F.R.D. 325, 386 (1964) (Rule 23(c)(2)) (emphasis added). However, the final version of Rule 23 dropped this last clause, leaving no discretion for courts to impinge upon this essential right to opt out in the type of cases for which subsection (b)(3) was meant to encompass, that is, where the claims were wholly or predominately for damages at law.

The new rule also incorporated other due process protections for absent class members, including the requirements of notice and adequate representation, as defined in Hansberry and Mullane, supra. In addition, the rule clearly envisioned that further due process protections--beyond those expressly stated in the rule--might be necessary in a given case. For example, subsection (d) provided "a non-exclusive list" of possible orders that courts could enter to protect class members. 7B Wright et al., supra, § 1791, at 286-87. The Advisory Committee also emphasized that the rule "does not disturb the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action." Advisory Committee Notes, supra.

Even as finally promulgated with these protections, new Rule 23 provoked controversy, with the extension of common question classes regarded as the "most controversial" and "most doubtful" change. 7B Wright et al., supra, § 1783, at 71; Charles A. Wright, Proposed Changes in Federal Civil, Criminal and Appellate Procedure, 35 F.R.D. 317, 338 (1964). Leading commentators at the time expressed deep concerns, which they ultimately assuaged with the expectation that courts would vigilantly guard due process rights.

Among those most concerned was Justice Black, who submitted a statement objecting to the new rules, and, in particular, Rule 23:

> I particularly think that every member of the Court should examine with great care the amendments relating to class suits. It seems to me that they place too much power in the hands of the trial judges and that the rules might almost as well simply provide that "class suits can be maintained either for or against particular groups whenever in the discretion of a judge he thinks it is wise." The power given to the judge to dismiss such suits or to divide them up into groups at will subjects members of classes to dangers that could not follow from carefully prescribed legal standards enacted to control class suits.

Amendments to Rules of Civil Procedure, 383 U.S. 1029, 1035 (1966) (Statement of Black, J., dissenting).

Professor Wright also voiced concerns, stating:

> In the situation which (b)(3) covers, there is a strong feeling that the person who wants to go it alone, and to bring his individual action with his own lawyer, should be permitted to do so. . . . Even with this protection [of the right to opt out], (b)(3) is a novel and controversial proposal. . . .

Wright, supra, 35 F.R.D. at 338.

Judge Frankel also called the sweep of the (b)(3) class "among the more debatable" provisions of Rule 23 and compared the opt-out procedure to the Book-of-the-Month Club. Marvin E. Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 44 (1967). He indicated his preference for an affirmative opt-in procedure, so that silence would not constitute consent to inclusion. Marvin E. Frankel, Amended Rule 23 From a Judge's Point of View,

32 Antitrust L.J. 295, 299 (1966). In the end, he urged that Rule 23 not "be pressed to the limits of its logic or to the literal dimensions that its language might possibly suggest," id. at 297, and that judges extend the protections of Rule 23:

> I would suspect that the courts will not be insensitive to such potentially sweeping consequences. It seems probable that they will look soberly at the criteria given for their guidance, and at others they are entitled and invited to evolve, before allowing and defining a class under the new rule.
>
> . . .
>
> . . . . [T]his realm of discretion marks the ground on which the new rule will be vindicated or destroyed. It is a robust challenge to all of us.

Id. at 297, 301 (emphasis added).[12]

More recent commentators also have recognized that the 1966 expansion of class actions mandated an increasing emphasis on due process rights. See, e.g., 7B Wright et al., supra, § 1791, at 288 ("Inasmuch as the binding effect of class actions has been significantly expanded by the 1966 amendment to Rule 23, courts must be even more sensitive to the protection of absentees than they have in the past." (footnote omitted)).

Thus, Rule 23 clearly contemplates--and the constitution mandates--that due process protections in addition to those specifically mandated in the rule may be necessary, depending upon the nature of the class. Indeed, Rule 23(d) provides authority to allow the right to opt out in "mandatory" classes.

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[12] Given Judge Frankel's sentiments, it is disingenuous for petitioners--with an out-of-context citation--to rely upon Judge Frankel in arguing that Rule 23 protections should be dismantled. See Brief for Petitioners at 30.

7B Wright et al., supra, § 1796.1 (Supp. 1993) (citing County of Suffolk v. Long Island Lighting Co., 710 F.Supp. 1407 (E.D.N.Y. 1989), aff'd, 907 F.2d 1295 (2d Cir. 1990)). See also 3 Newberg & Conte, supra, § 17.16, at 17-44 to -45 ("Whenever unliquidated damages are sought for individual injuries suffered, whether sought as the primary or ancillary relief, then such claims are necessarily uncommon with the class representative's claims. . . . Accordingly, when unliquidated damages are involved, the exclusion right must be afforded as a constitutional matter, regardless under which Rule 23(b) category the class may be certified."); Manual for Complex Litigation, Second, § 30.231, at 229 (1985); 3B Moore & Kennedy, supra, ¶ 23.45[1], at 23-292 & n.20.[13]

[13] Thus, due process rights may not be circumvented by the label given to a class. In the present case, the action was classified as a (b)(1) and (b)(2) class in the original Multidistrict Litigation ("MDL") proceeding. In re Real Estate Title & Settlement Services Antitrust Litigation (I), 1986-1 Trade Cas. (CCH) ¶ 67,149, at 62,928-29 (E.D.Pa. 1986), aff'd without opinion, 815 F.2d 695 (3d Cir. 1987), cert. denied, 485 U.S. 909 (1988). This classification was erroneous. As two appellate courts stated, the settlement "involved the foreclosure of substantial damage claims." See In re Real Estate Title & Settlement Services Antitrust Litigation (II), 869 F.2d 760, 768 (3d Cir.) (emphasis added), cert. denied, 493 U.S. 821 (1989); Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992)(emphasis added). Accordingly, the class should have been certified, at least in part, under subsection (b)(3). Moreover, regardless of the category of certification, absent class members should have been entitled to the right to opt out, at least with respect to their damage claims. Indeed, Ticor illustrates the worst of all possible scenarios from a due process perspective: all individual damages claims were extinguished, with no individual notice and no right to opt out--and with no monetary payment whatsoever. As the Third Circuit stated, plaintiffs in the MDL litigation "lost more than the absent plaintiffs lost in Shutts, and yet were given fewer procedural protections." In re Real Estate Title (II), 869 F.2d at 762.

3. Post-1966 Decisions and the Distinctions Between Claims for Damages at Law And Equitable Relief

After the 1966 rule changes, and the expansion of class actions into a new domain, this Court was even more emphatic about the necessity of protecting the rights of individual class members.[14]

In one of its early major post-1966 decisions, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), this Court demonstrated the full extent to which the rights of individual class members must be safeguarded under amended Rule 23. Eisen raised the issue of adequate notice in a Rule 23(b)(3) antitrust and securities class action with six million members and a class representative with only a $70 stake. Despite the size of the individual claims, the Court held that the class could proceed only with individual notice to all two million class members whose names and addresses could be identified with reasonable effort. Id. at 176. Since the petitioner represented he would not bear this cost, the Court remanded the case "with instructions to dismiss the class action as defined." Id. at 179.

Significantly, the Court in Eisen stated that such notice was required so that each individual class member "may request exclusion from the action and thereby preserve his opportunity to press his claim separately. . . ." Id. at 176. See also Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 351 (1983) ("Eisen's notice requirement was intended to inform the class member that he could 'preserve his opportunity to press his claim separately' by opting out of the class." (emphasis in original)).

[14] Cf. Martin v. Wilks, 490 U.S. 755, ___, 109 S.Ct. 2180, 2184 (1989) (recognizing "our 'deep-rooted historic tradition that everyone should have his own day in court.'").

The Court in Eisen also distinguished monetary relief at law from equitable relief, limiting its holding to common question class actions for damages, as opposed to classes under subdivision (b)(2) "for injunctive or declaratory relief." 417 U.S. at 177 n.14.

Against this backdrop, the decision in Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), was merely a basic reaffirmance of minimum due process protections necessary in class actions. Although the precise holding focused on personal jurisdiction, the entire opinion and the history of class actions clearly demonstrate Shutts' underpinnings in principles of fundamental fairness under a due process analysis.

Shutts confirmed that "a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs." Id. at 807 (emphasis added). Although the Court upheld Rule 23's opt-out provision against a challenge that only an opt-in procedure would satisfy due process, id. at 813-14, the Court emphasized that this right to opt out could not be abridged in a class action for money damages:

> [W]e hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.

Id. at 812 (emphasis added). In note three, the Court distinguished claims for equitable relief, limiting its holding to class actions "which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We

intimate no view concerning other types of class actions, such as those seeking equitable relief." Id. at 811 n.3.[15]

Thus, to a large extent, the decision in Shutts (as in Eisen) merely confirmed the long-standing historical distinction between damages at law and equitable relief in the class action context, a distinction based upon the reluctance to extend class actions beyond their traditional bounds without, at a minimum, the most stringent protection for absent members. Petitioners' claim that Shutts does not apply in the context of the present case and that mandatory damage classes would

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[15] There is another fundamental difference between damages at law and equitable relief in the class action context. Equitable claims, of course, are not covered by the Seventh Amendment right to a trial by jury. But it has long been established that jury trials are required in class action proceedings for damages at law. See Ross v. Bernhard, 396 U.S. 531, 541 (1970). The right to jury trial is "fundamental and sacred," Jacob v. City of New York, 315 U.S. 752, 752 (1942), and scrupulously protected. Thus, the Court stated in Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959):

> In the Federal Courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency.

Id. at 510 (quoting Scott v. Neely, 140 U.S. 106, 109-10 (1891)); see also Chauffeurs, Teamsters, and Helpers, Local 391 v. Terry, 494 U.S. 558, __, 110 S. Ct. 1339, 1345 (1990) ("any seeming curtailment of the right to a trial by jury should be scrutinized with the utmost care" (quoting Beacon Theatres, 359 U.S. at 502)); Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937) ("as the right of a jury trial is fundamental, courts indulge every reasonable presumption against waiver."). Clearly, at a minimum the right to opt out must be preserved when the right to trial by jury is implicated. See 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil §2321, at 104 (1971) ("A waiver by one party cannot bind other parties. The right to a jury trial runs to every party." (footnote omitted)).

comport with the development of Rule 23 and due process have no basis in historical reality.[16]

II. PETITIONERS' RADICAL SUGGESTION FOR MANDATORY CLASSES IN MASS TORT LITIGATION DEMONSTRATES A FUNDAMENTAL MISUNDERSTANDING OF THE HISTORICAL AND CONSTITUTIONAL FRAMEWORK UNDERLYING THE CLASS ACTION DOCTRINE

Given the history of class actions and the constitutional principles at stake, petitioners' suggestion that there is no constitutional right to opt out of any class action--and that the Rule 23(b)(3) opt-out right should be reconsidered--is a radical proposition.[17] Petitioners seek to justify this exhortation by claiming that mandatory classes are necessary to alleviate the burden of mass tort litigation on the federal courts. Even assuming that policy considerations can overcome constitutional imperatives, which they of course cannot, petitioners fail to recognize that mass tort actions are among the least suited type of case for any type of class action proceeding. Moreover, as noted in further detail below,

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[16] Petitioners assert that "this Court and the lower federal courts have frequently upheld mandatory class actions that included monetary claims." Brief of Petitioner at 19. However, the sole citation petitioners provide for a Supreme Court case is Califano v. Yamasaki, 442 U.S. 682 (1979), a class action regarding the right of Social Security recipients to pre-recoupment hearings. This Court specifically noted in Califano that the relief below involved injunctions and that the Ninth Circuit, in affirming the class-wide relief, believed "that, because respondents did not seek damages, no manageability problems were present." Id. at 688-90 (emphasis added).

[17] See Brief of Petitioners at 28 (arguing against "a constitutional right to opt out of any properly certified class action, regardless of whether it includes monetary claims.").

contentions about a crises in the tort system are greatly exaggerated.[18]

From an historical perspective, the journey from the traditional class action to the mass tort case is of truly staggering dimensions: from cohesive, equitable classes to groups of individuals with no pre-existing or continuing legal relationships with each other and with highly-individualized and highly-personal injury claims for damages at law.

Even the 1966 Advisory Committee--while drafting a rule extending the reach of common question class actions--was careful to note that a "mass accident is ordinarily not appropriate for a class action." Advisory Committee Notes, supra. In a mass tort action, the claims are so personal that there is "a general feeling . . . that each person should have the right to prosecute his own claim and be represented by the lawyer of his choice." Yandel v. PPG Indus., Inc., 65 F.R.D. 566, 569 (E.D. Tex. 1974). See also 3B Moore & Kennedy, supra, ¶ 23.45[4.-1], at 23-335 to -336 ("In personal injury actions the fact that the litigation vitally affects a significant aspect of the plaintiffs' lives is a factor in favor of individual litigation."). In some cases, the claims literally implicate matters of life and death.

In addition, while there may be some common issues in a mass tort action, the damage claims are usually highly

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[18] Despite the focus of the brief of the American Insurance Association, et al., as amici curiae, the present case does not raise the issue of a limited fund class action under Rule 23(b)(1)(B), and thus TLPJ respectfully submits that this Court should avoid any ruling that would impact this troublesome area of class action litigation. It should be noted, however, that such classes in mass tort litigation often raise serious issues of abuse of Rule 23 procedures. See Keene Corp. v. Fiorelli, No. 93-7712, 1993 U.S. App. LEXIS 31268, slip op. at 13 (2d Cir. Dec. 1, 1993)("it is clear that the complaint is an attempt to compel an adjustment of Keene's creditors' rights outside the Bankruptcy Code. . . .").

individualized and unliquidated. The severity of injury and size of claim varies dramatically from victim to victim. The emotional stake varies accordingly--and the individual's interest in controlling his own litigation to vindicate deeply-personal rights is often paramount.

These divergent--and potentially conflicting--interests regarding damage claims raise serious concerns about the adequacy of representation in a mass tort class. When interests diverge, adequate representation becomes difficult, if not impossible, to secure. See Hansberry v. Lee, supra. The right to a jury trial also is a powerful consideration. As this Court stated in Wooddell v. Int'l Brotherhood of Elec. Workers, Local 71, ___ U.S. ___, ___, 112 S. Ct. 494, 498 (1991), "[a] personal injury action is of course a prototypical example of an action at law, to which the Seventh Amendment applies."

Recent experience with mass tort class actions demonstrates why the right to opt out is of such critical import. In the real world, the type of mass tort class action that defendants typically advocate is not a litigation class, but, instead, a class for settlement purposes only. See, e.g., Keene Corp., supra, 1993 U.S. App. LEXIS 31468 (class action filed against asbestos victims for sole purpose of seeking a mandatory settlement); Carlough v. Amchem Prods. Inc., 5 F.3d 707, 711 (3d Cir. 1993) (class action complaint, answer and stipulation of settlement all filed on same day in nationwide asbestos action); Bowling v. Pfizer, Inc., 143 F.R.D. 141 (S.D.Ohio 1992) (heart valves). As a general matter, of course, settlements are to be encouraged, but not at any price. Settlement classes, in any setting, offer serious potential for abuse. See, e.g., Manual for Complex Litigation, Second, supra, § 30.41, at 236 ("As a practical matter, the dynamics of class action settlement may lead the negotiating parties--even those with the best of intentions--to regard the interests of the class members too lightly."). In a class action,

the pressures for settlement are oftentimes overwhelming. From the perspective of defendants, settlement is an opportunity to cap risk. From the perspective of the courts, settlement is an opportunity to clear calendars--of, at times, literally tens of thousands of cases in one grand gesture. From the perspective of class counsel, the economic stakes are monumentally enticing.

The individual victim's interest is too often ignored in the sweep of more powerful forces. The right to opt out remains the individual's sole fail-safe. It also serves as a check on the entire process, since the potential of opt-outs provides some incentive for parties negotiating a settlement to be more respectful of the rights of these absent class members.

Eliminating the right to opt out in these circumstances would be a fundamental breach of the constitutional rights of individual class members. These constitutional principles cannot be abrogated on the basis of claims of a crisis in the system. In the first place, contentions that mass tort cases are overwhelming the federal court system are simply erroneous. Indeed, a review of the empirical evidence demonstrates that there has been a decrease in tort filings in recent years.[19] The

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[19] Study after study--of empirical data--refute the extreme rhetoric of the tort "reform" movement. Thus, even "[t]he most comprehensive studies--by experts sympathetic to the tort reform cause--indicate that, except for the special case of asbestos litigation, product suits have declined sharply--by 40 percent--over the past five years." Kenneth Jost, Tampering With Evidence: The Liability and Competitiveness Myth, A.B.A. J. 44, 45 (Apr. 1992). From the period 1975 to 1985, "torts constituted a shrinking proportion of the federal civil caseload"--with filings falling from 22 percent to 15 percent of all federal cases. Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System--And Why Not?, 140 U. Pa. L. Rev. 1147, 1200 (1992) (emphasis in original). At the same time, tort cases were "far overshadowed" by growth in contract litigation, social security cases and recovery of federal overpayments. Id. at 1200-01. Indeed, the Wall Street Journal recently reported that "[b]usinesses may be their own worst enemies when it comes to the so-called litigation explosion. Preliminary

one exception to this trend is the asbestos litigation, where decades of willful misconduct on the part of an entire industry has caused unparalleled death and disease. Clearly, asbestos victims--and other victims of mass torts--must not be called upon for further sacrifices, including the forfeiture of their constitutional rights.[20]

Moreover, some principles simply do not yield, even for the sake of so-called efficiency. As this Court has stated:

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972) (quoting Stanley v. Illinois, 405 U.S. 645, 656 (1972)).

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data in the first-ever study of litigation patterns of Fortune 1000 companies show that businesses' contract disputes with each other constitute the largest single category of lawsuits filed in federal court." Suits by Firms Exceed Those By Individuals, Wall St. J., Dec. 3, 1993, at B1.

[20] Of course, if petitioners succeed in their arguments that Shutts applies only in state courts, significant forum shopping would lead to an increase in nationwide class actions in federal courts, multiplying the caseload burdens that petitioners decry.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Ninth Circuit should be affirmed.

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